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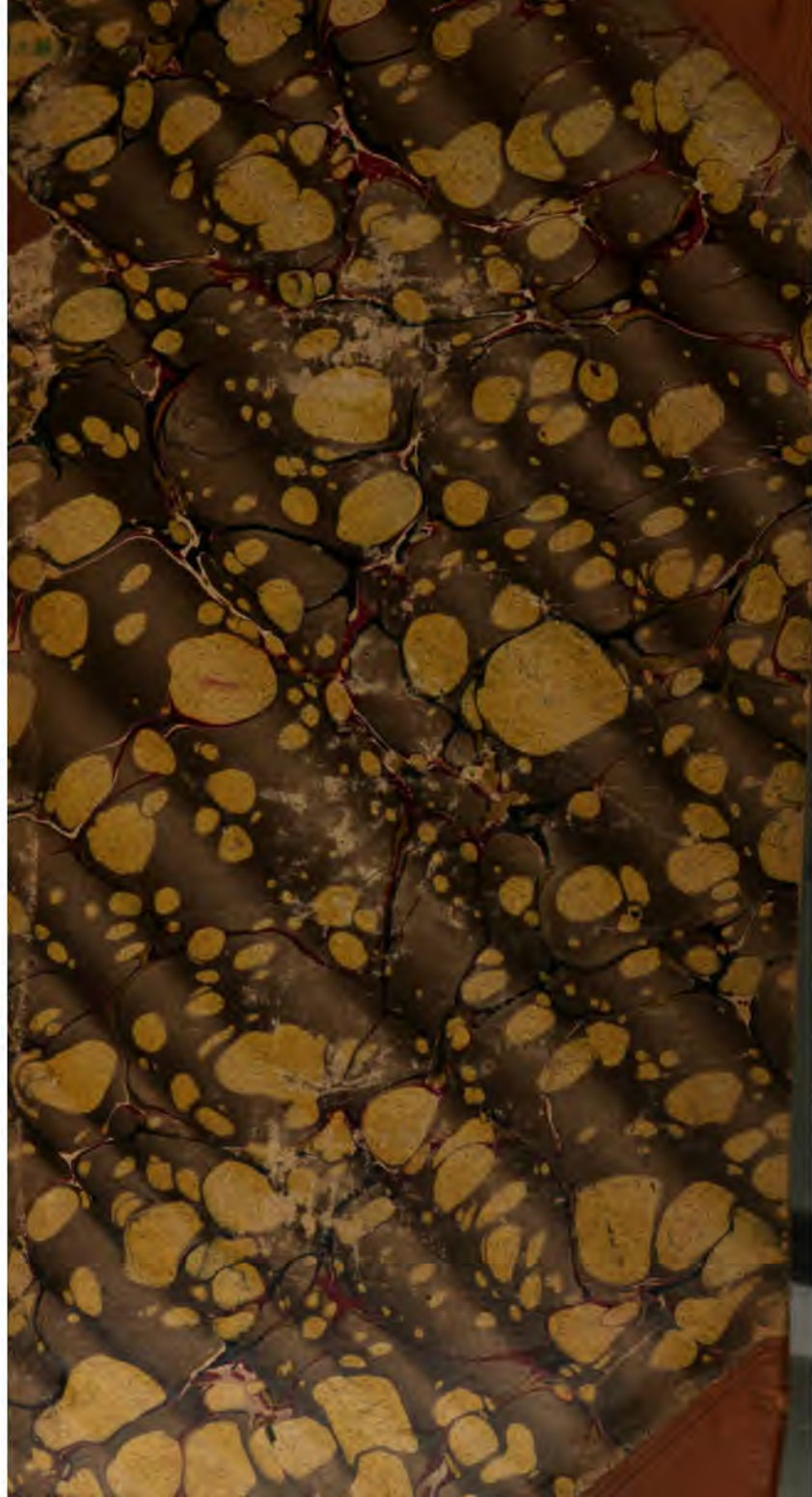
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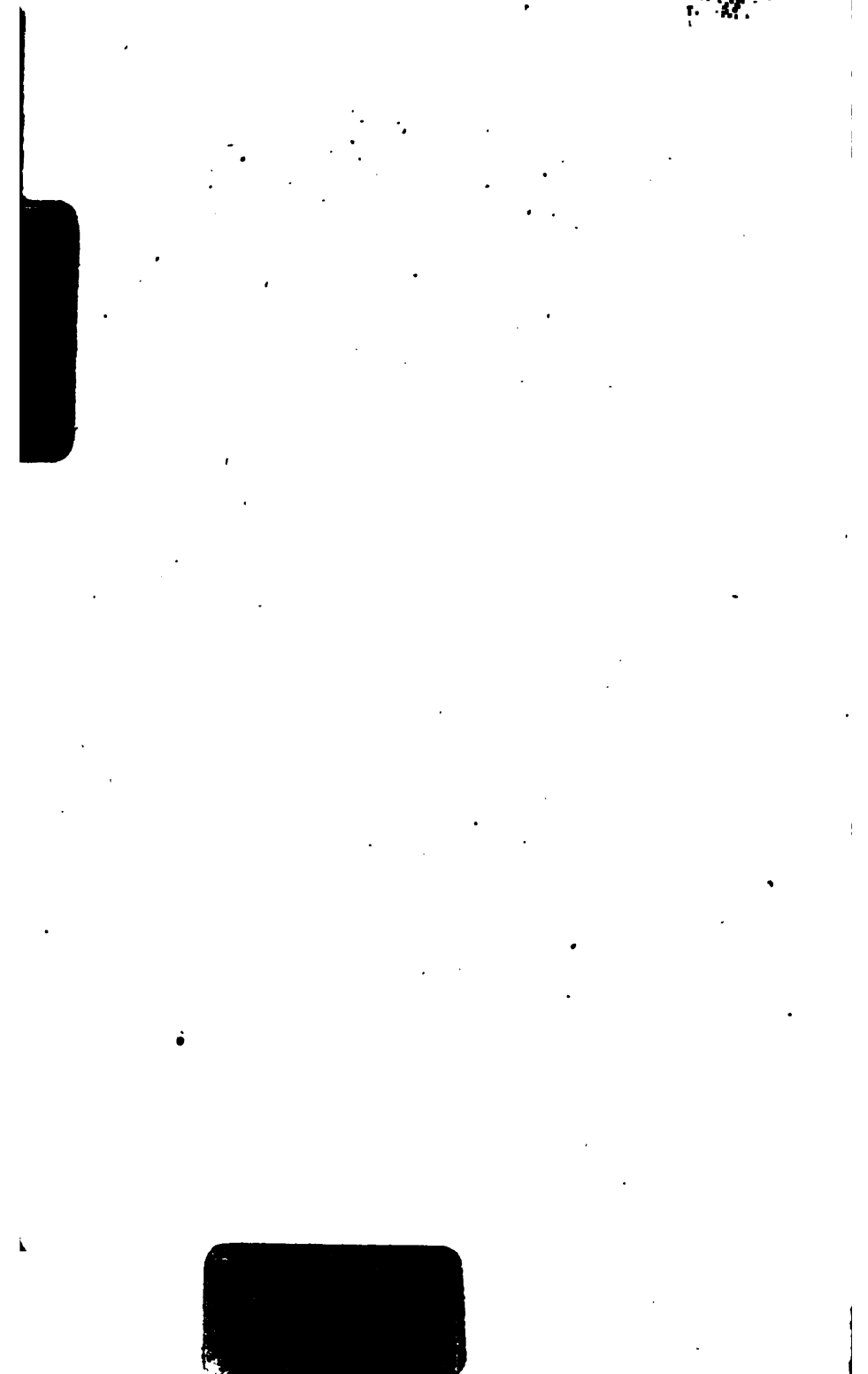
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Chas. H. Smith
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ART. I.—HISTORY OF JURISPRUDENCE—THE
WRITINGS OF PUFFENDORF AND LEIBNITZ.¹

SAMUEL BARON VON PUFFENDORF was born in 1632. He was educated at the University of Jena, where he studied the Cartesian philosophy. In 1661, he was appointed Professor of the Law of Nature and Nations, at Heidelberg, and afterwards at Lund. He died in 1694, at Berlin.

He discussed Natural Law as a separate question, independent of the obligations of Revealed Religion or Positive Civil Law.² His works are,—“*Elementa Jurisprudentiæ Universalis* ;” “*De Jure Naturæ et Gentium* ;” “*De Officio Hominis et Civis*.” He promulgated the principle of Sociability which Grotius had started.

The edition of Puffendorf “*De Legibus Naturæ*” which we have before us is a heavy folio of 900 pages, closely printed in double columns, “done into English by Basil Kennett, D.D., late President of Corpus Christi College, in Oxford.” The English

¹ This sketch of the History of Jurisprudence is continued from *The Law Review*, vol. xxiii. p. 88.

² WORKS :—Sam. Puffendorf. *Elementa Jurisprudentiæ Universalis* : Hag. Com. 1660 ; Jen. 8vo. *De Jure Naturæ et Gentium* libb. viii. : Lund. 1672 ; Francof. 1684, 4to. ; cum notis Hertii, Barbeyreci, et Mascovii, Francof. et Lips. 1744, 1749, 2 vols. 4to. ; translated into English by Basil Kennett, folio, Lond. 1717, 1729 and 1749. *De Officio Hominis et Civis* libb. ii. : Lund. 1673 ; cum notis variorum, Lugd. Bat. 1769, 2 vols. 8vo.

translation was successful, and the third edition was published in London in 1717. We must admire the learning and industry of both author and translator; but here our praise must stop short. The ponderous disquisitions upon the origin and variety of moral entities, the quantity and imputation of moral actions, the right and privilege of necessity,—these discussions in the introductory part of the work, which professes to be purely scientific, are no longer of use; whilst the chapters on Occupancy, Covenants, and the other details of Law, are merely compilations from the Roman Civil Law, stripped of its characteristics.

The treatise is divided into eight books; but it is far from our purpose to give more than a few quotations from them. The first draft of the work was published in the year 1660, under the title of "*Elements of Jurisprudence.*" The labour of twelve subsequent years was expended in bringing it to the form in which, at present, it exists in our libraries. In that labour our author was not content to have drawn together all assistance from the stores of morality, politics, and law, but, following the example of his great predecessor Grotius, he engaged himself on a longer and wider search; running through the whole circle of philological authors, ancient and modern, and disposing under the heads of his work the most remote examples and illustrations. Hence, every page is loaded, not only with numerous citations, but also with disorderly marks of addition, reference, and comparison.

The foundation of the system of Puffendorf is embarrassed with metaphysical subtleties. Moral entities are defined to be certain modes superadded to natural things and motions by understanding beings, chiefly for the guiding and tempering the freedom of voluntary actions, and for the procuring of a decent regularity in the method of life. Puffendorf terms them "*modes,*" because he conceives Being in general to be more conveniently divided at large into Substance and Mode, than into Substance and Accident. Moral entities are of this kind, the original of which is justly to be referred to Almighty God, who would not that men should pass their life like beasts, without culture and without rule, but that they and their actions should be moderated by sundry maxims and principles, which could not

be effected without the application of such terms and notions. Hence, the end of them is plainly to be discovered, which is not like that of natural beings, the perfection of the universe, but the particular perfection of human conduct.¹

The second chapter is on the "Certainty of Moral Science." It had been an established persuasion amongst the generality of learned men, that moral knowledge is destitute of that certainty which is found especially in mathematics. The foundation of this notion has been, that they have taken morality to be incapable of demonstration, from whence only true science, free from the fear of error, can proceed ; and they imagine that all its evidence rises no higher than a probable opinion. Aristotle has contributed not a little to this, when he said that honesty and justice have so many different faces, and are liable to so many mistakes, that they seem to be only instituted by law, and not originally decreed by nature.²

Puffendorf does not assent to the doctrine of some writers, that there are several things honest, or dishonest, of themselves. He argues that dishonesty and turpitude are affections of human deeds, arising from their agreeableness, or disagreeableness, to a rule or a law ; and since a law is the command of a superior, he does not understand how we can conceive any goodness, or turpitude, before all law, and without the imposition of a superior ; and he considers that those who would establish an eternal rule for the morality of actions, without respect to the divine injunction and constitution, join with God some coeval extrinsic principle, which he was obliged to follow in assigning the forms and essences of things. God created man according to his own free will ; how then should it come to pass, that the actions of mankind should be vested with any affection or quality proceeding from intrinsical and absolute necessity, without regard to the institution and pleasure of the Creator ?³

In the first book diffused chapters⁴ follow upon the understanding of man, as it concurs to moral actions ; and upon the qualities, estimation, and imputation of moral actions.

The second book starts with the proposition, that it is not

¹ Book i. chap. 1, sec. 3.

² Book i. chap. 2, sec. 1. :

³ Book i. chap. 2, sec. 6.

⁴ Book i. chaps. 3—9.

agreeable to the nature of man to live without laws. He then attempts to discuss the natural state of man, abstracted from all the rules and institutions, whether of human invention or of the suggestion and revelation of Heaven. By this wide exemption are excluded not only all the various arts and improvements, and the universal culture of life, but especially civil conjunctions and societies; by the introducing of which, mankind was first brought under the decent management of order and regularity.¹

This natural state of man may be imagined in theory, but is one in which we never have found historically any portion of the human race, and it is a state which, for practical purposes, it is wholly unnecessary to consider.

The theory of Hobbes is next discussed; whether this alleged natural state in regard to other men bears the semblance of war and peace. Hobbes says, "Every man is an enemy to every man, whom he neither serves nor obeys."² And again, the state of commonwealths amongst themselves is natural, that is, hostile; and though they cease to fight, yet this intermission must not be called a peace, but a breathing-time, during which each enemy, observing the motions and the countenance of the other, rates his security, not by covenant, but by the strength and the designs of his adversary. After discussing this opinion, Puffendorf ends by admitting that the desire of peace is too weak and uncertain a security for its preservation amongst mankind.³

Since, then, it is inconsistent with the nature and the condition of man that he should live entirely loose from all law, and to perform his actions by a wild and wandering impulse, without regard to any standard, it follows that inquiry should be made into that universal rule of human action to which every man is obliged to conform, as he is a reasonable creature. The law of nature does not depend upon the consent of nations, but the principles of right are to be discovered by natural reason. The dictates of right reason are true principles, which agree with the nature of things, well observed and examined. And the true original of the law of nature is derived from the condition of man.⁴

Man is an animal desirous of his own preservation, exposed

¹ Book ii. chap. 2, sec. 1.

² Book ii. chap. 2.

³ De Cive, chap. 9, sec. 3.

⁴ Book ii. chap. 3, secs. 13, 14.

to many wants, unable to secure his own safety and maintenance without assistance, and capable of returning kindness by the furtherance of mutual good ; but he is as powerful in effecting mischief as he is ready in designing it. Now, that such a creature may be preserved and supported, and may enjoy the good things attending his condition of life, it is necessary that he be social. This, then, will appear a fundamental law of nature ; that every man ought, as far as in him lies, to promote and preserve a peaceable sociability with others, agreeable to the end and disposition of the human race. By the term Sociability, Puffendorf implies such a disposition of one man towards all others as shall suppose him united to them by benevolence, by peace, and by charity.¹

Reason is not the law of nature itself, but the means, upon a right application of which, that law is to be discovered.²

Puffendorf discusses the proposition, whether the law of nations be distinct from the law of nature. Hobbes divided natural law into the natural law of men, and the natural law of states, commonly called "the law of nations." He observed that the precepts of both are the same, but that, for as much as states, when they are once instituted, assume the personal proprieties of men, hence it comes to pass that what we term the law of nature when speaking of the duty of particular men, we term the law of nations when we apply it to whole states, nations, or peoples : with this opinion Puffendorf coincides.

The best division of natural law, is into duties towards ourselves and towards others. Self-defence is discussed with needless prolixity ; yet it is important as the first principle from which springs the right of public punishment, and the right of the state to exercise the public force, and the public government, for the preservation of all.³ Chapters follow upon the right and privileges of necessity, and upon the measure of damages where injury is done : in these details much is borrowed from the Roman law.

The second chapter of the third book is upon "the Natural Equality of Mankind." Besides that affection which every man maintains for his own life, and body, and possessions, by which

¹ Book ii. chap. 3, sec. 15.

² Sec. 20.

³ Book ii. chap. 5.

he cannot but resist, and repel, whatever threatens destruction to those dear concerns; we may discover likewise, deeply rooted in his mind, a most tender esteem and value for himself, which if any one endeavour to impair, he is seldom less, and sometimes much more, incensed, than if a mischief had been offered to his person, or to his estate. This passion is in the very constitution of human nature. The word "man" is thought to carry dignity in its sound, and is commonly resorted to as the last argument against an insult. Under natural equality, how much soever a man may surpass his neighbours as to bodily or intellectual endowments, he is still obliged to pay all natural duties.¹

Puffendorf then discusses the common duties of humanity; ²—the duty of keeping faith, and the diversity of obligations to it; ³—the nature of promises and covenants in general; ⁴—the consent required in making promises and covenants; ⁵—the matter of promises and covenants, and their conditions.⁶ Promises are divided into perfect and imperfect. Imperfect promises, or *nuda pacta*, seem to be obligatory, by the rules of veracity, and for the sake of maintaining confidence amongst men, rather than in strict justice. Promises are invalidated by error; and fraud in either party annuls a contract, at the option of the other.

The fourth book commences with a disquisition on the use and origin of speech; and then proceeds to the obligation which attends speech. A lie is a violation of a right, which Puffendorf derives from a tacit contract amongst mankind that words, or signs of intention, shall be used in a definite sense which others may understand.

The second chapter of the fourth book is on the sanctity of an oath. An oath is a religious asseveration by which we either renounce the mercy or imprecate the vengeance of Heaven, if we speak not the truth.⁷ An oath must be taken only in the name of God, and according to the religion of him that swears. Since in promises, consent grounded upon mistake is not effectual towards producing an obligation, therefore an oath is not

¹ Book iii. chap. 2.

² Chap. 3.

³ Chap. 4.

⁴ Chap. 5.

⁵ Chap. 6.

⁶ Chaps. 7 and 8.

⁷ Book iv. chap. 2, secs. 1—4.

binding, in case it be evidently made out that the person who swore supposed some matter to be otherwise than it really proves to be, and which if he had not supposed, he would not have taken the oath; but oaths obtained by deceit or fear, or to perform things unlawful, are not binding.¹

The constitution of man is such that it cannot be preserved by its own internal substance, but needs continually to take in the assistance of certain things from without, as well for its nourishment and support, as for its defence against those many enemies which seek to ruin and dissolve its frame.

Puffendorf then enters into the question of destroying living creatures for the purposes of food, and justifies it on the following singular argument. No mutual right or obligation passes between men and brutes, nor ought to pass by the direction of nature; for we neither find that the law of nature, by virtue of its absolute authority, commands us to maintain friendship and society with brutes, nor are they capable of sustaining any obligation towards men arising from covenant. From which defect of all common right there arises, as it were, a state of war between those who both are able to hurt each other, and upon probable grounds are supposed to be willing.

Puffendorf next treats of the origin of property. Property is defined as a right, by which the very substance of a thing so belongs to one person that it doth not in whole belong after the same manner to any other: property proceeds immediately from an agreement amongst men. There are two qualifications necessary to make the object of dominion or property.² First, it must be able to afford some use to men; secondly, it must be in some way or other so far under the power of men, as that they may fasten on it, and keep it for their occasions. The questions about things which are consumed by their use, about property on the sea, and how far the navigation of the sea should be free, are next considered.³

The methods of acquiring property may be conveniently divided into original and derivative;—the former are those by which the property of anything was first introduced, the latter

¹ Secs. 7—9.

² Chap. 5, sec. 1.

³ Book iv. chap. 5, secs. 1.—10.

are those by which a property already settled passes from one man to another. The original method of acquiring property is occupancy.¹

The following chapters upon Rights over other Men's Property, upon the Transfer of Property, upon Wills and Testaments, upon Successions to Persons who die intestate, and upon Prescription, are open to the critiques usually passed upon the jurists of the Middle Ages,—that their works consist of mere extracts from the Roman law, stripped of its details. So of the fifth book, which is mainly conversant with contracts, it may be said that the greater portion of it is extracted from the Pandects. A great portion of the substance of it necessarily occupies a place in the text-books upon contracts in all civilized countries.

In the sixth book, chapters follow on Matrimony, on the Paternal Power, and on the Relation of Master and Servant.

The seventh book treats of Government. The true and leading cause why the fathers of families would consent to resign up their natural liberty and to form a commonwealth, was thereby to guard themselves against those injuries which one man was in danger of sustaining from another; for as nothing next to Almighty God can be more beneficial to man than man himself, so nothing is able to work him greater mischief. And for redress of those evils which men, at the suggestion of depraved nature, delight to bring upon each other, they had recourse to themselves as the surest defence, by joining together in one body, and erecting a civil society. Sovereignty is the result of those covenants by which the public body was first united.²

The chapters on the Form of Government, the Duties and Power of the Sovereign, are scarcely of any importance at the present day. The concluding chapters of this immense dissertation are upon the Right of War, Treaties, Compacts of Sovereigns, and the Changes and Dissolution of the Commonwealth.

Grotius had derived the origin of government from the natural sociableness of mankind. Puffendorf concluded that

¹ Chap. 6, secs. 1—14.

² Book vii. chap. 3, sec. 1.

the real cause was experience of the injuries which one man might inflict upon another. He considered that civil society must have been constituted first by a covenant of a number of men, each with each, to form a commonwealth, and to be bound by the majority,—in which primary covenant they must be unanimous; that is, every dissentient would retain his natural liberty; next, by a resolution or decree of the majority, that certain rulers shall govern the rest; and lastly, by a second covenant between these rulers and the rest, one promising to take care of the public weal, and the other to obey lawful commands. This sovereignty is founded on these covenants, and is not conferred, except indirectly, like every other human power, by God.¹

Punishment is defined as an evil inflicted by authority upon view of antecedent transgression. Punishments ought to be measured according to the object of the crime, the injury to the commonwealth, and the malice of the delinquent; hence offences against God should be deemed the most criminal; and next, such as disturb the state; then, whatever affect life, the peace or honour of families, private property or reputation. He concludes by establishing a great truth,—that no man can be justly punished for the offence of another, not even a community for the acts of their forefathers.²

It will thus be seen that Puffendorf attempted to reconcile the opinions of Hobbes and Grotius, and discussed natural law as a separate question, independent of the obligations of revealed religion or positive civil law. The philosophers of the Theological School became, in consequence, his enemies, particularly Alberti and Zentgrave. Puffendorf maintained as well the principle of sociability which Grotius had started, as the principle of selfishness described by Hobbes: from both he deduces the social compact, and the laws of morality and jurisprudence. He does not discriminate between natural and moral right, yet he may be said to have laid the foundations of a universal philosophy of practice.

LEIBNITZ³ has been compared by Gibbon to those conquerors

¹ Book vii. chap. 3.

² Book viii. chap. 3.

³ b. 1646, d. 1716.

whose empire has been lost in the ambition of universal conquest. He might have said with Faust :—

“Habe nun, ach! Philosophie,
Juristerei, und Medicin,
Und leider! auch Theologie,
Durchaus studirt, mit heissem Bemühen.”

Amongst his numerous attainments, he comprised both the philosophy of universal jurisprudence and the details of practical law. Yet he left no complete works on the subject, and the scattered fragments of his doctrines are found amongst his pamphlets and letters.

Gottfried Wilhelm Leibnitz was born at Leipsic, on the 23rd of June, 1646. His father was Professor of Moral Philosophy at the University of Leipsic; his mother was the daughter of a Professor of Law. From his earliest youth he applied himself with assiduity to a lengthened course of study. He read in succession the classic poets, orators, historians, and jurists; nor did he neglect the exact sciences, or theology. In the present brief notice we must confine ourselves to the discussion of his works on Politics and Jurisprudence.

When John Casimir, King of Poland, had abdicated the crown, in 1668, Philip, Count Palatine of Neuburg, was one of the candidates. Leibnitz, then only twenty-two years of age, was employed by him to write a treatise in his favour, under the *nom de guerre* of Georgius Ulicovius. In the previous year he had published a treatise entitled, “*Cesarini Furstenerii de Jure Suprematus ac Legationis Principum Germaniæ.*” This was written in reference to the ceremonial difficulties attending the treaty of Nimeguen. A difficulty had been raised as to the free Princes of the Empire who were not electors; and there was a reluctance to grant to their ministers the same titles and the same honours as to those of the Princes of Italy. In this political tract Leibnitz advanced an idea in reference to the imperial dignity which could not but displease other monarchs. He asserted that all Christian states, at least those of the West, were only one body, of which the Pope is the spiritual head, and the Emperor the temporal head; that there pertains to both one and the other a certain universal juris-

diction; that the Emperor is the General, the Defender, the Advocate of the Church, principally against the infidels; that hence come the titles of Sacred Majesty and Holy Empire; and that, although all this did not exist by divine right, yet it is a species of political system formed by the consent of the nations. From this he draws favourable consequences for the free Princes of Germany, who hold no more from the Emperor than other kings ought to hold.

The next work upon which Leibnitz was employed was the "History of the House of Brunswick." In order to collect the necessary materials, the Princes sent him to travel over the entire of Germany. He obeyed their directions, visited all the ancient abbeys, examined the tombs and other antiquities. Thence he proceeded to Italy, where the marquises of Tuscany, of Liguria, and D'Este, sprung from the same origin with the Princes of Brunswick, possessed their principalities. He returned from this journey in 1690. Leibnitz had made an abundant collection, more abundant than was necessary for the history of Brunswick. From this superfluity he made an ample selection, of which he published the first volume in folio in 1693, under the title of "*Codex Juris Gentium Diplomaticus*." To this volume he prefixed a well-written and well-considered Preface.

In the present sketch we cannot consider the other philosophical labours of Leibnitz, in which he rivalled Newton, confuted Bayle. He lived a flourishing and honourable life, having enjoyed the respect of the learned world of Europe, and substantial tokens of the regard of its crowned heads, in the shape of pensions from the Emperor, the Czar, and the King of England. His memory was extraordinary. It was his custom to make extracts from all that he read, and to add on the paper his own reflections. This writing seemed all that was necessary to engrave the subject on his memory for ever. He was always ready to answer questions on every matter; and William III. of England used to call him his walking dictionary. He conducted always an immense correspondence. It pleased him to enter into the labours and projects of all the *savans* of Europe. And all who wrote to him were certain of a reply. Leibnitz

died in Hanover, in 1716. We shall now proceed to analyze some of his works on Jurisprudence.

In 1667 Leibnitz published the short treatise entitled, "*Methodi Novæ discendæ docendæque Jurisprudentiæ.*" He was then only twenty-two years of age; but the work exhibits vast erudition and originality. The first part is on education in general; the second on Jurisprudence alone. We consider it so important, yet so little known, that we shall give a very brief abstract of its contents. He defines jurisprudence to be the Science of Right,¹ on some case or fact being proposed. When we attempt the method of treating it, we must do two things; first, delineate in idea the perfect jurisconsult, and whatever pertains to his perfection, as Cicero has done in his books "*De Oratore*;" secondly, point out the method of arriving at perfection; as Plato has in his books on the Republic put forward the perfect idea; but in his dialogues on the Laws, has laid down what any one might accomplish.² Whatever pertains to the erudition of the perfect jurisconsult may be divided, like theology, into the didactic or positive part, containing those things which are expressly extant in authentic books, and belong to acknowledged Right; the historical, which treats of the origin, authors, changes, and abrogations of the laws; the exegetical, which interprets the authentic books themselves; and the polemical or controversial, which determines by reason and analogy unsettled cases in the laws. Of these the didactical and polemical are properly the parts of Jurisprudence, but the historical and exegetical only "*requisitæ.*" The latter are theoretical, the former practical. The example of the division is with reason transferred from Theology to Jurisprudence, because there is an extraordinary resemblance between the faculties. Each has a twofold origin; partly reason, whence spring natural theology and jurisprudence; partly Scripture, or some authentic book, the former containing Divine laws, the latter human laws.³

Didactic Jurisprudence may not inaptly be termed by the name of Elements, in imitation of the Elements of Euclid,

¹ *Scientia juris.* We have used the edition of Leibnitz by Dutens: Geneva, 1768.

² *Works*, vol. iv. p. 180.

³ *Id.* vol. iv. p. 181.

whom, in the titles to their books, —Hobbes in the Elements “De Cive et de Corpore,” and Felde and Puffendorf in their Elements of Jurisprudence, have followed. Elements are composed of two things,—the explanation of terms or definitions, and of propositions or precepts, in a separate book. The definitions or explanations of judicial terms are to be treated without the intermingling of precepts or rules. This may be termed the divisions of Right,—*partitiones juris*.

Leibnitz then proceeds to comment on the various arrangements of former works, and to censure them, from the Institutes of Justinian, down to the numerous German writers.¹ Leibnitz censures the celebrated division of law into Persons, Things, and Actions. This division, originally published by Gaius, had been adopted in the Institutes of Justinian, and inextricably incorporated with the body of the Roman Law. It has been followed in modern times by Sir William Blackstone, and in the Code Napoléon. If it had always been interpreted according to the maxim of Weisembach,—*omne jus redditur personis, de rebus, per actiones*,—this doctrine might not have exercised such a deteriorating effect upon the development of Law; but its faulty nature will be best seen from the criticism of Leibnitz.

First, the division into persons, things, and actions, is superfluous; for actions arise as well from the rights of persons, as from the rights of things. And this division is drawn, not from matter of law, but from matter of fact; for persons and things are matters of fact, power and obligation terms of law; and a division of Jurisprudence ought to be taken from matter of law.²

Leibnitz further censures the diversity of arrangement between the Code, Digest, and Institutes. A new method of arrangement would bring incredible advantages, if it were accurate; for, in the first place, a wonderful compendium of things to be learned would arise, whilst by general rules, at the same time, infinite special rules will be learned; and the genera being premised, we will gradually descend to the species.

¹ Vol. iv. pp. 183, 184.

² Vol. iv. sec. 10, p. 183.

To take an example,—what is the need of specially inculcating in one place that a minor, in another that a madman, in a third that one who is absent, requires a guardian of his property, when the general rule is manifest from the very principles of political science, that he who is not able to manage his own affairs requires a guardian ?¹

Leibnitz then proceeds to give his own definitions. Jurisprudence is the science of actions so far as they are termed just and unjust. But that is just or unjust which is publicly useful or injurious ; publicly, that is, first, as to the world, or its ruler God ; secondly, as to the human race ; finally, as to the state. Hence Jurisprudence is divine, human, and civil. Jurisprudence should also be divided into as many parts as there are causes which produce rights and obligations. But the causes which produce rights and obligations are five:—1st. Nature, which gives the liberty and power of dealing with that which is the property of no one (*res nullius*). 2nd. Succession, by which the rights of the deceased are transferred to heirs. 3rd. Possession. 4th. Contract. 5th. Injury.

After some other definitions belonging to Didactic Jurisprudence, he proceeds to Historical Jurisprudence.² Historical Jurisprudence is either internal or external. The internal history of law is that which surveys the laws of different states ; for example, the works of Aristotle and Theophrastus, which have not descended to modern times. Leibnitz gives a complete list of historical works on the history of Law.³

Exegetical Jurisprudence is twofold—*ex textu*, or *ad textum*. The former is collected from various texts, not in the order of the texts ; the latter is accommodated, *κατὰ πῶδα*, to the very texts themselves. The former pertains to the Philology of Law ; the latter to the Commentaries on Law.⁴

The Philology of Law consists in the application of the sciences to Jurisprudence ; and is divided into Legal Grammar, Didactics, Rhetoric, History, Ethico-Politics, Logico-Metaphysics,—in fine, Legal Physics. The most important division of Legal Physics is Medical Jurisprudence. All these he illustrates

¹ Vol. iv. p. 184.

³ Secs. 29—41, vol. iv. p. 197.

² Vol. iv. p. 191.

⁴ Vol. iv. p. 198.

with his own definitions; and gives the works of the principal authors on each branch.

Legal Grammar also requires juridical concordances. In this the theologians have surpassed the jurists. It is inadvisable, however, to develop into the excessive bulk under which the theologians labour. Both theological and juridical concordances might be portable, if only the more remarkable places were taken note of, and in them only a somewhat unusual use of a word; for what is the need of collating things almost the same?

The interpretation of any text is real or textual. The real is that which elicits certain propositions from the law, and treats them absolutely, proving, and objecting, and solving objections, if it so seem fit. The textual interpretation is *κατὰ νόμον*, according to the words of the law; and is either total, for the whole law, or partial, for individual words. The total interpretation treats of the connection of the law with other laws, the author and history of the law, and the occasion upon which it was passed.¹

Polemical Jurisprudence is so infinitely diffused, that it cannot be exhausted, for new cases daily arise. Meantime it must be the business of the Jurist to collect and decide the cases already ventilated; so that when he shall be carried to new regions, that is, meet with new cases, he may easily extricate himself by means of the magnet—natural law.²

The principles of decision are Reason drawn from Natural Law, and Analogy from certain Civil Law. For if we consider the matter accurately, all civil law is rather a matter of fact than of right; inasmuch as it is to be proved, not from the nature of things, but from history. For it is to be proved that the law was promulgated, that the custom was introduced; then it is to be proved that he who passed the law had acquired to himself the power of legislation.³

There are three grades of natural law,—the strict law, equity, piety,—*jus strictum*, *æquitas*, *pietas*;—of which the latter is more perfect than the antecedent, and confirms it, and in case of opposition derogates from it. Strict or pure law descends

¹ Vol. iv. sec. 64, p. 207.

² Sec. 70.

³ Sec. 71.

from the definitions of terms, and is, weighed rightly, nothing more than the right of war and peace; for between person and person there is the right of peace only so long as the other has not begun war, or committed an injury; but between a person and a thing, because a thing does not possess reason, there is a perpetual right of war. It is permitted to a lion to tear a man in pieces, and to a mountain to crush a man in ruin; on the other hand, it is permitted to man to chain the lion, to pierce the mountain. But the victory of a person over a thing, and the captivity of a thing, is called possession. Possession, therefore, gives the right of a person over a thing by the right of war, provided the thing be the property of no person.

Leibnitz had scarcely published his "New Method of Jurisprudence," when he undertook the vast design of recasting the whole body of the Civil Law. Weighing all the faults which are attributed to the work of Tribonian, he considered that it lay with him to free it from all confusion. There was a three-fold confusion:—of the works themselves, of the subject matter, and of the laws. The confusion of the works consists in this, that the Roman Law is comprehended in diverse codes; that the order of one code is different from the order of another; and this inconvenience must be met by removing the variety of works; whatever is contained in the Code, Novels, Institutes, and Digest, must be collected in one work; the different changes of the law are to be accurately separated, following the order of time; what is contained in the Institutes is to be accommodated to the order of the Digest, rather than *vice versâ*. Leibnitz, approaching the confusion which occurs in matter, divides this into general, subalternate, and special. The confusion of laws consists partly in their dispersion, partly in their perturbation. The laws dispersed are those which are not contained under their proper titles; perturbation arises when they are arranged under their proper titles, indeed, but are not collocated in their proper order. For if the thing be the property of any person, it is no longer permitted to injure it, or take it away, any more than to kill the slaves of another, or to receive the runaways from another. If, therefore, one person

has injured another in his person or in his property, that gives to him the right which he had over a thing, or the right of war. There is also amongst the species of injury a pernicious deception, by which a damage is inflicted on the mind ; hence arises the necessity of observing promises. Hence is patent a pure single precept of natural law,—To injure no one, lest there be given to him the right of war. To this pertains Commutative Justice, and Right, which Grotius terms Faculty.¹

Equity or equality, that is, the ratio or proportion of two or more, consists in harmony or agreement:—*Æquitas seu æqualitas, id est, duorum pluriumve ratio vel proportio, consistit in harmoniâ seu congruentiâ*. This requires that against him who has injured me I should not wage an internecine war, but seek for restitution ; that arbitration should be employed ; that imprudence should not be so much punished as fraud and malice ; likewise, that crafty contracts should be nullified, and relief given to those who were deceived.²

The third principle of law is the will of a superior. But a superior is, in the first place, by nature,—God ; and his will is either natural,—hence piety ; or it is a law,—hence the divine positive law. Next, a superior exists by compact,—as man ; whence arises the Civil Law. Piety, therefore, is the third grade of Natural Right, and gives to the rest perfection and effect ; for God, as being omniscient and wise, confirms pure law and equity ;—as omnipotent, executes it. Hence the good of the human race, nay, the glory and harmony of the world, coincide with the Divine will. From this principle, we should not injure even the brute creation. From this fundamental principle, no one should even injure himself,—for we ourselves are gods, to whom Omnipotence has given power over all things : hence that principle,—Live honestly. And since strict law and equity want a physical sanction, God accomplishes, that whatever is publicly useful to the human race and the world, is also useful to individuals, and that everything honest is useful, and everything disgraceful injurious.³

Leibnitz then gives a lengthened course of legal study ; and

¹ Vol. iv. sec. 74, p. 213.

² Sec. 75.

³ Vol. iv. sec. 76, p. 214.

concludes the "Novæ Methodi" with a catalogue of desiderata, in imitation of Bacon, in the "De Augmentis Scientiarum." Some of these desiderata—still desiderata—are, *theatrum legale*, or the laws of all nations, places, and times, placed in parallel order; *historia mutationum legis*,—*philologia juris*,—*philosophia juris*,—*institutiones juris universi*,—*juris naturalis elementa demonstrativè tradita*,—*bibliotheca juris*,—*vitæ jurisconsultorum*,—*repertorium juris*,—*pandectæ juris novi*.

The rules given by Leibnitz are well adapted to remove confusion, and should be studied by those engaged in the Codification of Laws. He considers that all the books of Roman Law should be joined in one consonance of law, removing all distinction between Digest, Code, Novels, and Institutes; that a beginning should be made from generals; that then there should be a proceeding to subalternates and specials; that the order of the ancient law should be retained, where it can be retained; that the laws, or paragraphs referring to the same title, should be collected together, and these arranged according to the natural order of the *circumstantia*; that the law which can be referred to many titles, should be placed under that on which depends the reason of the decision of the same law. Leibnitz gives many other similar rules, which should be consulted and studied by all engaged in the labour of Codification.

The letter of Leibnitz to a friend, "De Nævis et Emendatione Jurisprudentiæ Romanæ," may be considered as an appendix to the preceding work. In it he states the principal errors of the Roman jurisprudence; the chief abuses that under it might arise in the progress of a cause; finally, he proposes a plan of bringing under one tabular form all universal rules, from the combination of which all questions could be decided.

The two Dissertations which Leibnitz prefixed to the "Diplomatic Code of International Law" met with a great success. Heineccius recommends their study after the great works of Grotius, Hobbes, and Puffendorf. In them Leibnitz shows how uncertain future history would be, if not based upon public documents; how useful it is to have before our eyes conventions and treaties; from which it is apparent what were the events of

wars, and from which can be illustrated the political arts. Leibnitz touches on the authority of the Emperor over the Church and all Christians; the authority of the Pope over all churches, and which authority was the means of introducing amongst Christians many things pertaining to the Law of Nations.

In the commentary on Puffendorf, Leibnitz has left a refutation of the principles of natural law as employed by that jurist. He says, that his principles labour under many defects. Something is still required which would exhibit lucid and fruitful decisions, which, from correct principles, would draw conclusions as by a thread, which might afford to the students of the science a certain means of supplying things omitted, and deciding questions in a determinate manner. These things might be expected from absolute science, duly treated:—"Optarem tamen exstare aliquid firminus et efficacius, quod lucidas fœcundasque definitiones exhibeat; quod ex rectis principiis conclusiones veluti filo deducat; quod fundamenta actionum exceptionumque naturâ validarum omnium ordine constituat; quod denique scientiæ alumniis certam rationem præbeat prætermissa supplendi, oblatasque quæstiones per se decidendi, determinatâ quadam viâ. Hæc enim a scientiâ absolutâ et ritè traditâ expectari debent."¹ Leibnitz proceeds to add, that something of this nature might have been expected from the judgment and learning of Grotius, or from the profound intellect of Hobbes; but many cares occupied the former, and the latter had set out from evil principles. Selden could have done more and better, if he would have spent his genius and learning with more zeal on such a work.

Leibnitz has expressed a considerable portion of his legal system in the dissertations prefixed to the "Diplomatic Code of the Law of Nations." The first dissertation is entitled, "*De Actorum publicorum Usu, atque de Principiis Juris Naturæ et Gentium, primæ Codicis Gentium Diplomatici Parti præfixa.*"² In the Introduction, he alludes to the slight regard paid to treaties.

¹ Monita quædam ad S. Puffendorffii Principia, sec. 1, Works, vol. iv. p. 276.

² Works, vol. iv. p. 287.

Lysander used formerly to say, that boys played with nuts, old men with oaths. And an elegant trifler in Batavia hung up a picture of a graveyard as a symbol of perpetual peace.

“Qui pacem quæris libertatemque, viator,
Aut nusquam aut isto sub tumultu invenies.”

Truly it seemed to be the condition of Europe, in the time of Leibnitz, for the sovereigns always to make war, and always treat of peace.¹

History is twofold,—Public and Private. And the laws of History are two;—both of which cannot be equally observed in each species of History: for the principle of Public History is to say nothing untrue—*nihil falsi dicere*; of Secret History, to omit nothing true—*nihil non veri dicere*.²

Leibnitz then proceeds to give a series of definitions of Justice according to the Platonic theory, making it to embrace the whole sphere of human duty. The doctrine of Right has been included by nature within narrow limits, but extended by the human mind to a gigantic space. The ideas of Right (*Jus*) and of Justice, even after so many illustrious writers, are very imperfect. Right—*Jus*—is a moral power, and obligation a moral necessity. *Moral* is defined by Leibnitz as that which with a good man is equal to *Natural*; for, as the Roman juriconsult said, *quæ contra bonos mores sunt, ea nec facere nos posse credendum est*. But the good man is he who loves all so far as reason permits. And justice in this sense is equivalent to the virtue which the Greeks call *φιλανθρωπία*.³ Justice is the virtue that governs this affection. Charity is universal benevolence; but since wisdom ought to direct charity, a definition of this too is required. Wisdom is the science of happiness.⁴

From this fountain flows the *Jus Naturæ*; of which there are three grades,—*jus strictum*, in commutative justice; equity, or, in the narrower sense of the word, charity, in distributive justice; finally, piety or probity, in universal justice: whence arise the general precepts of justice,—to injure no man, to give each man his own, and to live honestly. The præcept of strict law is that

¹ Prima Dissertatio, sec. 1.

² Sec. 2.

³ Dissertatio I. Primæ Codicis Gentium Diplomatici Parti præfixa, sec. 1, Works, vol. iv. p. 294.

⁴ Sec. 11.

no one is to be injured, lest, in the state, a legal redress should be given, or, without the state, the right of war arise. Hence springs that justice which the philosophers call Commutative, and the Right—*Jus*—which Grotius terms Faculty.

Leibnitz terms the superior grade of justice, Equity, or Charity; the meaning of which he extends beyond the rigour of strict law to those obligations from which no legal action accrues to those who are concerned; for example, Gratitude, or Almsgiving, —and to which the term Aptitude—*Aptitudo*, not Faculty—*Facultas*, is applied by Grotius. And as it is in the lowest rank of justice to injure no one, so it is in the middle rank of justice to benefit all, but as far as is suitable to each one, or as far as each one deserves; since we cannot favour all. Therefore the justice of this second rank is distributive; and the precept of Right is that which orders his own to be given to each. And to this are referred, in a government, the political laws which procure the happiness of subjects, and everywhere accomplish, that those who possess the aptitude should acquire the faculty,—that is, that they may be able to seek what it is right for others to afford them. And since in the lowest grade of justice, the distinctions of men are not regarded, in this superior grade merits are weighed; whence privileges, rewards, punishments, have a place.¹

Leibnitz has termed the highest grade of justice by the word Probity or Piety.² Pure or strict justice arises from the principle of preserving peace; equity or charity strives for something more. In a word, strict law avoids unhappiness; the superior law tends to happiness, but such as befalls this mortal life.³

Piety or probity is the highest grade of Law; for strict Law arises only from the principle of keeping the peace; equity aspires to something higher. But that we should disregard, in comparison with the great good of others, even life itself, and all that makes life desirable, is rather enjoined in fair language by philosophers than solidly demonstrated. For it is plain that honour and glory, and the sense of the mind exulting in its own rectitude, are good in the estimation of the mind,—great good indeed, but

¹ Sec. 12, vol. iv. p. 297.

² Sec. 13, p. 297.

³ Sec. 13.

not to all,—especially not to those whom neither a liberal education nor an ingenuous habit of life has accustomed to the regard for honour. But, that it should be established by universal demonstration that everything honourable is useful, and everything disgraceful injurious, the immortality of the soul must be assumed, and God the ruler of the world.¹

The Second Dissertation does not call particularly for our notice.

The remainder of the dissertations prefixed to the “Diplomatic Code of the Law of Nations” is chiefly concerned with the details of diplomacy of the age.

Leibnitz never had the leisure to carry out his plans on the subject of Jurisprudence. Writing to Magliabechi in 1697, he says:—“Multi anni sunt, quod promisi illustrare jurisprudentiam, et amplissimum juris oceanum ad paucos revocare fontes limpidos rectæ rationis, ut appareat tum quid pronuntiandum esset si nullas leges haberemus, tum quibus modis, recepto jure, a simplicibus naturæ placitis sit recessum, aut cur oportuerit aliquid illis addi. Nam multi quidem tractavere Jus Naturæ, sed pauci eorum simul ab interiore philosophiâ et a Juris Romani cognitione fuere admodum instructi.”²

¹ Dissertatio I. Primæ Codicis Gentium Diplomatici Parti præfixa, sec. 13, Works, vol. iv.

² Epist. xxviii. Works, vol. v. p. 118.

ART. II.—A CONSTITUTIONAL HISTORY OF JERSEY.

By Charles Le Quesne, Esq., Jurat of the Royal Court, and Member of the States. London: Longman and Co., 1856.

THERE can be no doubt that to the isolated position of Jersey,—its distance from the shores of England, whereto the allegiance of its denizens is due,—and its contracted area, comprising some forty-five square miles, are directly referable the following singular facts. We there find the feudal system to be still in force; the mode of procedure in civil and criminal cases to be antiquated and peculiar, in the former without a jury, in the latter by the *enditement*, and *grande enquête*, which are of Norman origin; we there find still extant the *Clameur de Haro*, the *Transport de Justice*, and other relics of an age long past, indeed, but which had till recently left its impress strongly on our laws and institutions. Of these relics of the olden time, a clear and interesting account is given in the work of which the title is placed at the head of this article.

The *Clameur de Haro*, observes Mr. Le Quesne, is of very ancient origin, and “is attributed, with every appearance of reason, to Rollo, the first Duke of Normandy. The old forms connected with this institution are still followed in the Channel Islands; but with this difference, that in Normandy the *Clameur de Haro* was principally raised in matters of a personal or criminal nature; whereas in Jersey and Guernsey it is only used in cases relative to real property. The proceedings are very summary: an appeal to the Prince must be attended to and obeyed without hesitation or delay. The *Clameur* is usually raised in cases of encroachment of property. When the name of Rollo is invoked in legal form, all workmen employed on the spot must instantly cease,—no work can there be proceeded with until the Royal Court has investigated the case, and pronounced judgment upon it. The form of appeal to Rollo has not lost its ancient solemnity. The party complaining must, on his knees, in the presence of witnesses, call

on Rollo's name in these prescribed words, '*Haro, Haro, Haro, à Paide, mon Prince, on me fait tort.*' The word *Haro* is an abbreviation of the words Ah Rollo, or rather, Ah Rou, which was the name by which that duke was really called. The Prince is the fountain of justice. None of his men or subjects must suffer wrong; an appeal to him must not be in vain. He will maintain right and equity. If the party, however, thus calling for the aid and protection of his Sovereign, is found on inquiry to have done so wrongfully, he is fined by the Court, for having, without just grounds, called on the name of Rollo; but if found to be in the right, the other party is fined for his transgression. The Sovereign is not to be invoked in vain; and the party in the wrong is subjected to a fine to the Crown, besides losing his case, and being cast in costs." Such is the *Clameur de Haro*.

The object proposed to be effected by the *Transport de Justice* is very much the same as is with us effected by a view. In Jersey, however, the Court itself is transported to the locality in question, whereas with us jurymen only go thither as viewers.

The *Transport de Justice* is thus explained by our author:—"In many cases of difficulty respecting houses and lands, when an official report is required to guide the Court in coming to a sound judgment on the matter *sub judice*, the Vicomte (who is the principal executive officer of the Royal Court, as well in civil as in criminal affairs) is directed to inspect the locality, and to make a report on the points in difficulty. This report may not be considered sufficient, and the parties may desire that the Court itself should proceed to the spot, and ascertain more accurately the position of affairs. This view by the Court is called a *Transport de Justice*, and it may take place with or without a preliminary inquiry by the Vicomte. The Court there hears the statements of the two parties, and the evidence produced by them, and pronounces judgment." A proceeding such as here described seems well adapted for doing justice in that class of cases in which complete justice cannot readily be done without ocular investigation of the locality which is the subject of litigation,—the jurisdiction of the Court being circumscribed by very narrow limits, as in Jersey.

"Another very ancient form preserved in Jersey, is that of taking an oath. It was followed in Normandy. It was employed in the early ages of the world. An oath is not [in Jersey] administered on the Testament, or on any book ; but the witness, holding up his hand towards heaven, swears that he will declare the truth, as he will answer to Almighty God, at his peril. Hence men of all creeds can take an oath in Jersey, in accordance with the prescribed form. It is a solemn declaration, an appeal to the God in heaven, that they will speak the truth, which they swear and promise to do—'*sans aucune faveur, haine, ou partialité, comme ils voudront en répondre devant Dieu à l'acquit de leur conscience.*'"

Such are some of the more remarkable results of an insular position, and of its Norman derivation, which still linger in Jersey.

It would be absurd, remarks Mr. H. D. Inglis in his work on the Channel Islands,¹ to expect generally, in an isolated community such and so small as that of which we are now speaking, those enlarged views, and that absolute freedom from prejudice, which may be looked for in larger communities. "There is usually in every small district, and especially in one distinguished by exclusive privileges, an overweening attachment to place, and to all that belongs to it, which is too apt to interfere with the correct exercise of judgment in distinguishing between good and evil. This is the origin of whatever defects may be observable in Jersey character." One result of the attachment to place and its belongings, here spoken of, is a disposition unduly to magnify the importance of local events ; to look with too jealous an eye to local interests ; and to affect to ignore events which happen elsewhere, and have no direct bearing thereupon. Writing but a dozen years ago, the author whom we have above quoted thus expresses himself:—It is certain, he says, that the number of Jerseymen who take any interest in what passes save within the limits of the island, is extremely small. "The proceedings of the British Legislature are far less interesting than the proceedings of their own States. The procedure in a suit before the Jersey Court of Justice is a far more engrossing topic than would be the

¹ 4th ed. p. 66.

impeachment of a king's minister; the politics of Europe at large would have no chance, weighed in the scale against some local political contention; and if the same packet were expected to bring the decision of kings and nations upon peace or war, or the disposal of crowns, and also the decision upon an appeal to the Privy Council upon some insular dispute, the latter would be the subject of the first and most eager questions by the crowds assembled on the quay."

But besides the excessive, though to some extent pardonable, concentration in self thus indicated, it unfortunately happens that party feeling is very rife in Jersey, its effects being proportionately greater as the limits within which it acts are circumscribed. The great mass of the country people and of the tradespeople of the towns and villages are of one party, assuming to defend against the attacks of the better educated and higher classes their so-called island privileges. The inhabitants of the island, remark the Royal Commissioners, Messrs. Ellis and Bros (Report, p. 39), are divided into two parties, which contend with the utmost vehemence and even virulence for the possession of power in the States and in the parochial assemblies: with these parties the police are inevitably mixed up. One-third of the States, renewable by periodical (triennial) popular election, consists of the constables; the jurats, who constitute another third, are elected for life by the ratepayers; and the rate is fixed by the parochial assembly, of which the police constitute a necessary component part, and in which they form the nucleus of a party. The remaining third portion of the States, or governing body of the island, consists of the clergy, the rectors of the twelve parishes into which it is divided, who are appointed by the Crown. And thus we have before us the sufficiently discordant elements whereof the Legislative Assembly of the island of Jersey, presided over by the Bailiff, is composed.

One striking peculiarity in the constitution so dear to Jersey-men is this; the Royal Court, or supreme judicial tribunal of the island (whence an appeal lies only to her Majesty in Council), is constituted of a section of the States,—viz. the Bailiff and the Jurats,—in whom, accordingly, legislative and judicial functions

are combined. Bearing in mind the strong political excitement which prevails at the election of a jurat, upon which occasion "the whole island is in a ferment," and recollecting that the judge may be described as "borne into the seat of justice on the shoulders of a party," we can hardly wonder if the court of justice is sometimes an arena for party feuds, nor if the appeals to the Judicial Committee of the Privy Council have, in bygone years, been somewhat numerous. Another ground of objection to the constitution of the Royal Court is, that legal education or legal knowledge is not deemed a requisite qualification of a jurat. "A farmer, a shipowner, a merchant—anybody—may be seated on the bench by the electors. *No previous acquaintance with law or usage is required*; no preparatory education; no education of any kind requisite."—(Ingliš, p. 93.) Upon the point here adverted to we have the concurrent testimony of the Commissioners. "The jurats," they tell us, "are chosen under a system of election in which the suffrage is very widely extended; and as members of the States, they are expected to take an active share in the struggles between contending parties. The persons thus selected have therefore seldom received any legal education: other requisites are more valued. It results almost inevitably, that they must often be prompted to act upon their own individual notions of justice, instead of ascertained rules of law. A strong instance of this occurred lately upon a conviction for murder, where two of the jurats, avowedly from a dislike to capital punishment, proposed to pass a sentence of transportation for life, *though no punishment of this crime other than capital has ever been recognised by the law of Jersey.*" The Bailiff, indeed, who presides in the Royal Court, is, and of late years has generally been, a regularly-educated lawyer; but his legal knowledge is never available, unless there be a difference of opinion among the jurats, and an equality of votes for each opinion. Even then he can vote only for one of the opinions which the jurats support; and it has happened that he has been compelled to support an opinion at variance with his own, because of the two opinions held by the jurats neither accorded with his view of the law.—(Report, p. 42.)

It does not appear that this objectionable state of things,

although pointed out and animadverted on by royal commissioners, has in any way been mended. Mr. Le Quesne, indeed, expressly tells us (p. 451) that "the right of election of jurats has always been considered by the people of Jersey as one of their most valuable privileges. Like their ancestors, they have always been jealous of the judicial power. The presence of twelve jurats of their choice on the Bench" (albeit in so small an island twelve men cannot always be found possessing all the legal knowledge and acquirements desirable for jurats.—*Ibid.* p. 22) "acts as a check to encroachments, and to the exercise of arbitrary power by the bailiffs, in whom, in the absence of written law, and without the presence of assessors, too much power would otherwise be vested." This state of things, however, as above depicted, is manifestly anomalous and bad, and ought to be put an end to, albeit we can well understand the repugnance which may be entertained in the island itself to innovation, and the disinclination which our Government may feel to the forcing of reforms upon a loyal and well-affectioned people.

Mr. Le Quesne, who is himself a jurat of the Royal Court, writes *con amore* on his subject; he writes, moreover, with good sense and discretion, and does not take a wholly one-sided view indiscriminately favourable to the institutions of his own country. Into the purely historical portions of his work we cannot appropriately inquire, although we have perused them with much interest, and can commend them to the attention of our readers. The feuds of the ancient Jersey families would furnish ample matter to "point a moral" or "adorn a tale." We will rather quote from our author some remarks explanatory of the functions, sessions, and mode of procedure of the Royal Court.

"From very early times," says Mr. Le Quesne, "this Court has formed itself into two tribunals, according to the nature of the causes to be tried. These are the Cour d'Héritage and the Cour de Catel. The former takes cognizance of matters relative to real property; the latter of possessory questions of goods and chattels, and of criminal matters. The Cour de Catel, however, at present has, as such, very little civil business; there being now two subsidiary courts, called la Cour du Billet and la

Cour du Samedi. At la Cour du Billet, which sits on Fridays during term, actions for debt are brought, but particularly for arrears of rents or mortgages. Actions for debt are also brought before the Cour du Samedi. This Court derives its name from the day on which it is usually held; but it sits on other days besides the Saturday. The cases which are brought before the Cour du Samedi are of various kinds. Criminal prosecutions are commenced before this Court, and they occupy much time. Matters that affect personal property, contested elections, repeals of wills, commercial and shipping affairs, police business, the poor, the militia service, the King's revenue, are of the cognizance of the Cour du Samedi.

"The Court of the greatest dignity," however, "and which opens the business on the first day of its sitting in term with much ceremony, is the Cour d'Héritage. It was formerly a Court of great importance, and had the power of making ordinances or provisional laws. At the Assize d'Héritage, or first day of sitting, the principal feudal seigneurs or lords, holding *in capite* from the Crown, are bound to appear and to answer to their names, either by themselves or by procureurs duly authorized by them, when called by the procureur-général. Three consecutive defaults are followed by the resumption of the fief by the Crown. The Lieutenant-Governor is usually present at the Assize d'Héritage, where he owes *comparence et suite de Cour*, as the representative of the bishops, abbots, and abbesses of former days, who possessed fiefs and property in this island, till they were taken possession of by the Crown." No cases in litigation are heard by the Court at the Assize d'Héritage; but agreements between parties relative to real property may be produced there and made binding by registration. At this Court also matters touching the revenue of the Crown are inquired into. The proceedings of the day appropriately terminate with a dinner given by the Crown to the Governor of the island, the Bailiff, and members of the Court, and to the seigneurs of fiefs, who owe *comparence* at the Assize d'Héritage.

Thus much as to the civil jurisdiction of the Royal Court: it has also jurisdiction in all cases of crime committed in the island, except high treason. The Court in cases of murder

sentences the criminal to death, and has not only *la haute justice*, but *la "haute justice royale,"* to use the words of the old Norman Coutumier. This of course it has, being a Royal Court; but it is remarkable how an old Norman custom, which indicated the existence of a Court having *la haute justice royale*, has been preserved in Jersey to the present times. According to the Coutume de Normandie, "Les haults justiciers ont gibet à quatre poteaux, et les bas justiciers à deux, donc que les moyens justiciers doivent avoir gibet à trois poteaux. Il est une haulte justice royale, qui est et appartient au prince, et une autre justice haulte qui appartient aux seigneurs soumis et qu'ils ont du don du haulte et la plus souveraine, et est celle qui a à corriger les autres justices et peut congnoistre de moult de cas dont les autres ne peuvent congnoistre. Et pour l'excellence et dignité d'elle, est raison que le gibet d'icelle ait aucune prevention au devant des aultres haultes justices. Pourquoi l'en peut dire que les aultres haultes justices qui ne sont pas royaux ne doivent avoir leur gibet que à trois poteaux. Et la haulte justice royale ent doit avoir quatre, et est le nombre commun."

It may appear singular that the number of *poteaux* should be a distinguishing mark of the rank, dignity, and authority of a Court. That the Royal Court of Jersey was and is a Court of the highest dignity, is therefore evident from the fact of the continued existence of four *poteaux* or stone pillars on Gallows Hill, where executions take place. These pillars were a few years ago demolished, but without the knowledge, sanction, or permission of competent authority. The last criminal executed in Jersey was Philip Jolin, in the year 1829, for parricide, and the execution took place on Gallows Hill, where the pillars were in existence. The keeping of the pillars in proper repair was part of the duties of the Vicomte. There is an act of the Court of 14th October, 1630, directing the Vicomte "de faire bâtir deux pilliers de la Potence, n'y en restant plus que deux, et d'y faire mettre quatre poutres, aux frais et charges du Roi; lequel Vicomte délivrera sa bille au receveur pour être payé accor-damment."

But although the Royal Court of Jersey is privileged to have and maintain, for the infliction of extreme penalties, a gallows

à quatre poteaux, its decrees do not seem to be characterized by that certainty and uniformity which are elsewhere deemed essential to the due administering of criminal justice. The reason of this has been already partly indicated by the allusions which we have made to the constitution of the Supreme Court. Another cause of the unfixed state of the law in Jersey is to be found in the *rarity of recorded precedents*. "The law now rests almost exclusively on the modern practice of the Royal Court; but the number of decisions is small, and these are not reported so as to furnish adequate means of instruction in the principles recognised by the Court. The annual number of offenders tried by the Royal Court on an average of ten years is only 137, of whom fifty submitted in the first instance. There is a record of every cause, and occasionally this contains the ruling on some disputed point. But the grounds of the decision never appear, otherwise than by a very brief and technical recital of the view which the Court takes; no detailed judgment showing the reasoning which has led to this view appears, nor are the arguments of counsel set forth. It is almost impossible that decisions so few in number, so slightly reported, and not published at all, can afford a foundation for a fixed system of law." —(Report, p. 28.)

Precisely to the same effect Mons. Le Cras testifies, in his volume on the Laws, Customs, and Privileges, and their Administration, in the Island of Jersey (Intro. p. iv.), that "the laws have hitherto been unknown to the public, because they have been confined to the breasts of the jurats, who exercise an almost absolute despotism," &c. And to quote again from the Report of the Commissioners (which is well worthy of careful examination by those who feel interested in the past and present condition of the Channel Islands), we there meet with this *résumé* of the subject:—"The result of this examination into the present state of the criminal law of Jersey appears to us," remark the Commissioners, "to be that, except in the case of those lighter offences, and the few more serious ones which have been the subject of specific enactments, neither the definition of crimes nor their punishment rests upon any authority which can be deemed permanent for the future, or even certain.

for the present. The offences now punished are scarcely in a single instance classified according to the ancient law, nor have there been substituted for this either direct legislative provisions, or new practical principles capable of being distinctly ascertained, or possessing any assured stability. In other countries, where the penal system has not been reduced to a code, the definitions of offences, and the punishments by which they are visited, have become perfectly known from a long course of precedents, carefully recorded, constantly referred to, and furnishing a system as well understood, if not as scientifically arranged, as can be constructed by a formal code. Law so laid down is fixed till a change is made by the legislative power, openly announced, and asserting an equally positive rule. But in the law of Jersey the practice which innovates on the custom, introduces in its stead nothing which is not equally liable to change. The evil is not mitigated, but aggravated, by a nominal reference to the works which are the supposed depositaries of the ancient law. For wherever the law as there exhibited differs from the law as practised, a reference to it amounts in effect only to the recognition of an additional disturbing force. The practice which is now constantly prevalent of referring to English legal works and precedents as authorities, seems indeed to have become almost the only practical mode of introducing fixed principles into the criminal law of the island."

Not only in the Royal Court, but amongst some of the inferior ministerial officers of the island of Jersey, viz. the *connétables* and *centeniers*, does a lack of legal knowledge seem to be prevalent.

The word *connétable*, or "constable," conveys to English lawyers the idea of an authority much inferior to that which the constable, and as acting for him the *centenier*, constitutionally possesses. These officers have functions partly resembling those of our police magistrates. They may, in certain cases, take bail from a party arrested, where the offence does not amount to felony; they can also bind parties to keep the peace. In numerous cases they assume the exercise of a discretion which in England would not be thought compatible with the duties of a police officer. In the case of an assault, the consta-

ble considers it part of his duty to inquire whether the assault has not been provoked by libel or slander, if that is alleged, in some cases they consider themselves authorized to decide as to whether a report shall be presented; that is, in effect, whether a prosecution shall go on.

The *centeniers* are elected by the ratepayers of a parish for three years. The duties of these officers are subordinate to those of the *connétable*. If they seize any person for a misdemeanour, or a crime, they must make a written report of the attendant circumstances to the *connétable*, who presents it, together with the persons accused or arrested, to the Court. The office of *centenier* is, accordingly, one of trust and responsibility: in the absence of the constable, the *centenier* may act as his substitute. The *centenier* is, moreover, a conservator of the peace, and can act independently of the constable in police cases, excepting that his report is addressed to the *connétable*, whereas the *connétable* reports to the Court. It might, then, reasonably be expected that officers thus intrusted with important local duties should possess some modicum of legal knowledge,—some slight conception of the requirements and formalities of criminal procedure. It does not seem, however, that this is sufficiently cared for by our Jersey neighbours.

“In one instance a *centenier* of St. Helier’s had in his hand a forged bank-note, which had been traced to a party who said that he had received it of a person whom he did not know. The *centenier* proposed to this party that he should pay the amount to the holder, and that the note should be destroyed; and this being acceded to, the *centenier* himself burnt the note in the presence of the two.” “He did not,” remark the Commissioners, “appear to have understood that there was other than a pecuniary question between two parties; and the importance of preserving evidence of the crime had, as far as we could judge, not suggested itself to him.” This officer, nevertheless, had been *centenier* for three years, and a police officer of a lower rank for many years.—(Report, p. 38.)

It is, however, but fair to call to mind that since the date of the Report of the Commissioners, important changes have been effected by the States, with the sanction of her Majesty

in Council. A Court has been established for minor criminal offences, the judge of which is the Bailiff, the Lieutenant-Bailiff, or one of the jurats specially appointed by the Bailiff. The judge of this Court sits four days a week, or oftener if necessary. All persons arrested by the police must be presented at this Court; and the judge, after hearing witnesses, is empowered, for minor offences, to sentence the offender to an imprisonment not exceeding eight days, and in graver cases he can decide whether there are grounds for committing the accused parties to prison for trial before the Royal Court, or whether they may be liberated, or admitted to bail.

The judge of the Police Court is also the judge of a new Court for the recovery of debts not exceeding 5*l*.

Important changes have also been introduced in the constitution of the police. The *officiers du connétable* are now no longer elected by the parish assemblies, but by the inhabitants, or rather ratepayers of districts. The number of *centeniers* in the parishes of St. Helier's and St. Martin's has been increased, and the powers of the police officers have been enlarged. In addition to these changes, is also the appointment of a paid police, particularly for night duty, in the town of St. Helier's.

Let us now say one word specifically respecting the volume before us. It is evidently written *bond fide*, and by one who has a thorough acquaintance with the various topics of which it treats. Mr. Le Quesne speaks fully and clearly of the constitutional history, laws, and customs of the island of Jersey; we are, nevertheless, struck with one omission in his work:—he does not sufficiently indicate the legal relations which subsist betwixt the island and its fostering parent. He does, indeed, speak of the right of appeal from the Royal Court to the Queen in Council; he does enter at considerable length into the doings of the various Commissions emanating from the Crown, which have from time to time inquired into and made suggestions for improving the local institutions of Jersey; but he does not speak at all of the jurisdiction which our Courts may exercise therein by writ of *Habeas corpus*, nor of the various important cases in which the extent of that jurisdiction has been discussed and finally determined. It is impossible that

our author, a jurat of the Royal Court, and manifestly conversant with his duties, can be ignorant of *Carus Wilson's* case (7 Q. B. 984); of the somewhat elaborate judgment of Lord Langdale in *re Belson* (7 Moore P. C. C. 114), and other decisions touching the matter in question, which are to be found in the recent English law reports, but which we care not just now to enumerate. It would, we think, have been more becoming in the author of a book of six hundred pages on local constitutional law, not wholly to have ignored the existence of the writ of *Habeas corpus*, nor to have abstained from presenting to his readers some information—brief and succinct though it might be—touching the efficacy and applicability of that writ in the island, whose institutions he has proposed to himself to illustrate and describe.

Thus qualified, we must, however, accord sincere praise to the author of "A Constitutional History of Jersey," for the manner in which he has performed his by no means light or easy task; and we doubt not, from the internal evidence which his book affords, that by him the scales of Justice are held equally, and her decrees impartially awarded, when sitting as a jurat of the Royal Court.

ART III.—LIFE PEERAGES.

ONE of the most important questions of constitutional law which have been raised for many years, was forced upon Parliament by the very ill-advised, and, it may most confidently be said, ill-considered—apparently, indeed, never at all considered—measure of creating Sir James Parke, on his retiring from the Bench, a Baron of the United Kingdom for and during the term of his life, instead of the ordinary limitation to the heirs male of his body. An opinion had prevailed among lawyers, grounded entirely upon a very loose and inaccurate passage in Lord Coke's First Institute, that the prerogative of the Crown extended to legalize such a grant. When the matter was

examined closely, this opinion appeared to be erroneous; but at all events, if the prerogative ever existed, it was admitted that it had not been exercised for centuries; and this of itself, if not decisive of the question, was at least an undoubted reason for fully considering the legality of the patent before the Crown was advised to issue it. Nevertheless, it turns out that the ordinary precaution had not been taken of requiring the opinion of the Crown lawyers, and there is no doubt entertained in Westminster Hall that their answers would have been given against the grant, because it is well known that such is now the opinion of those learned persons. We are not about to enter at large into this discussion, upon which the most ample information will be found in the paper of Mr. Lewis, read before the Juridical Society; the pamphlet of Mr. Macqueen;¹ and the speeches of Lords Brougham, Campbell, and St. Leonard's, corrected and published by themselves. It is much to be lamented that Lord Lyndhurst, whose motion gave rise to the debate in the House of Lords, did not pursue the same course; but the report of his speech in Hansard is given with great fulness. We shall only bring a few propositions before our readers, sufficient to explain the grounds upon which, whatever doubts may for a moment have been entertained in consequence of the subject never having been narrowly examined, all lawyers are now satisfied that there exists no such power in the Crown as that of which the Ministers, without inquiry, almost without reflection, advised the exercise.

The validity of any claim of prerogative must of necessity depend upon the exercise of that prerogative. If any branch of the constitution has been in the practice of using certain powers, it is presumable that its claim to possess them has been undisputed by the other branches, and acquiesced in by the nation at large. If it has been opposed in the exercise of them, and has notwithstanding persisted, until the opposition ceased, and then the exercise was continued, the possession of the right

¹ Mr. Macqueen's Letter to Lord Lyndhurst incidentally touches on the subject, but not so satisfactorily as might have been expected from one so peculiarly learned on the constitution of the House of Lords. It contains important information on the history of the Lords' jurisdiction.

became even more clear than if it never had been questioned. But a power only exercised in a few instances, even if unresisted, more especially if these instances occurred two centuries ago, can only be admitted as lawful if established by positive law, either by statute or by judicial declaration of the common law. Now, the power claimed for the Crown, of granting peerages for life, is admitted never to have been exercised for much more than two centuries; it is, indeed, not shown that in a single instance a commoner ever was admitted to sit in Parliament upon a creation for life, unless that title was given by assent of the other estates, and was, therefore, a statutory creation; but all the alleged cases are in times when the constitution could not be said to exist in the form which it has assumed for the last century and a half; that is, since the Revolution.

The supposed precedents in favour of the Crown, drawn from the times of the Plantagenets and the Tudors, are manifestly of no value whatever. They would be of little more weight were they in the times of the Stuarts. To be assured of this, we need only recollect the exercise of the prerogative in those days; nay, its undisputed, and, far more, its unrestricted, exercise on many things of the greatest importance, and on which it is now admitted on all hands that such prerogative is illegal, although neither Act of Parliament nor judicial decision have declared it to be so. One of the Plantagenet kings prohibited, by the writs issued, any lawyer being elected to serve for a county; one of the Tudors sent his instructions to a sheriff to return one of his servants; boroughs were constantly enfranchised and disfranchised by the writs being sent to them or withheld; and Queen Elizabeth in this way gave, of her own mere will and pleasure, the power to petty boroughs of returning no less than sixty members. All these, and other prerogatives of the same age, were exercised without dispute; and they were never declared illegal by any statute, nor by any decision of either the Houses themselves, or the Courts of Law. Indeed, we have sufficient proof of the meekness with which the judges received the most violent stretches of prerogative, when by a majority of their number, after the fullest argument at the bar, they pronounced their memorable decree in the case of ship-

money,—“*Quod secundum legem Joannes Hampden oneretur.*” What chance was there that any act of Henry VIII., how violent soever, would meet with opposition in a Parliament which had given him without hesitation the power of bestowing the Crown by will, and the further power of making Orders in Council which should have the force of statutes? It is to be observed, that the instance of life peerage most relied upon is that of Thomond, granted while this absolute power was vested in the Crown by law. It was also during the existence of the Bloody Act, as the Law of the Six Articles is termed by all Protestants, inflicting capital punishment on any one who denied the dogmas, transubstantiation included, which that capricious tyrant happened to believe at the time. To rely upon precedents at such a period of our constitutional history is manifestly in the highest degree absurd: even if precedents are to be found, they would neither show that the prerogative now exists, nor prove that it ever had a legal existence.

The whole question relates to the right of sitting in Parliament under the grant of honour for life. Whatever else belongs to the honour, no one denies that the grantee possesses it. But how utterly absurd it is to contend that the Crown can give the power of sitting in a manner never known in the good times of the constitution, that is, since it was established in its present form, must appear manifest if we attend to the manner in which the House of Lords was constituted in the earlier period of its history. The lesser Council of the King, that is, his Privy Council, and his judges, were regularly summoned to Parliament, and sat and voted with the Peers. Great obscurity hangs over the question at what time those persons not being Peers ceased to vote, and only attended as assistants or advisers. Lord Hale, perhaps the highest authority on this subject, holds that this change began in the reign of Edward III. He also considered it as a great innovation, and inconsistent with constitutional principles, that judgment should be given in appeals by the House in its own name, and not, as in writs of error, in the King's name. But even if all the judgments had continued to be given in the King's name, this would not have proved that any except Peers could take part in them otherwise than as advisers,

whose opinion the Lords could follow or disregard, being no more bound to ask for it than to abide by it. To ground any argument upon what the Crown may have done in those times, when it had the power of making its Privy Councillors sit with the Peers, is manifestly extremely absurd; and whatever precedents may be produced from those times, must go for absolutely nothing.

It is further to be remarked, that although, for the reasons now given, there are either no precedents at all, or if any, no precedents of the least weight, they who deny the prerogative may with perfect safety to their construction admit that the Crown once had the power, and not only exercised it, but had it by law; for a prerogative, however legal, may be lost unless it is given by statute, and then our rule of law seems to apply, that no desuetude can repeal it. Now it is clear that the Crown at one time had prerogatives touching the Peerage which no longer exist. The power of giving a seat in Parliament, by making a person a Privy Councillor, is indeed one instance of this, and we have just now referred to it. But barony by tenure affords another. The Crown could annex a barony to the tenure of land; indeed, originally, all barony was by tenure. The greater barons, tenants *in capite* of the Crown, sat in the Upper House, or were members of the Lords' portion of the whole, when both bodies sat in the same chamber. The lesser barons sat by their representatives in the Lower House, or formed the Commons' portion of the whole body, before the Reformation. But it has been solemnly adjudged by the Privy Council, after great argument before Vaughan, C. J., and Hale, C. B., with the Ancient Serjeant and other King's Counsel, that barony by tenure has ceased to exist, and is no longer valid in law; and the writ claimed *ratione tenuræ* was, on the report of their Lordships, refused, but granted to the competitor claiming by blood. In like manner the right to a summons *jure uxoris*, either, living the baroness in her own right, or claimed after her decease by the courtesy which formerly was undisputed, has been pronounced no longer to exist; and consequently the Crown can no longer give to the husband of one created a peeress the right to sit in the Lords' House. These decisions, be it observed, are of the more binding force, because they are given against the preroga-

tive by the representatives of the Sovereign,—the Council and the judges of the Crown. It is therefore matter of demonstration that prerogatives have been at one time vested in the Crown, which, without any statutory provision either to enact, or to declare their abolition, belong to the Crown no longer, because they have fallen into desuetude. Nor is it the Crown only that has suffered this loss; the other branches of the Legislature have outlived their privileges and their powers. Where be now the protection of members of Parliament for their servants as well as for their own persons? We observe, Lord Brougham argues, from the undoubted change which time has made in the various powers of the Crown, that its right to confer seats in Parliament upon life Peers has long since ceased by the desuetude of centuries, supposing it ever to have existed; but we take the liberty of reminding his lordship of a power exercised by the House of Commons, and referred to by himself in deciding the question of privilege against a member who denied the power of the Courts of Justice to commit members of Parliament. We find in the report of the case in *Mylne and Craig* (1831), reference to the proceedings of the Commons not quite a century ago,—the last year of George II.'s reign,—when, under the pretence of privilege, that House tried an action of trespass, and compelled a person who had interfered with a member's right, or alleged right of fishery, to give up his claim, and promise never more to disturb the possessor. Such a privilege, we venture to affirm, would not now be thought of by the most zealous advocate of Parliamentary privilege,—we will say, were he happily alive, by Serjeant Wilde himself, who, we were told in a late debate, by Lord Grey, refused many briefs in order that he might attend the committee on *Hansard's* case; but we will add what his lordship was not apparently aware of, who gave up one Spring Circuit in order to attend the committee upon the *Long-Wellealey* case, although he failed to obtain a decision of the House against the Court of Chancery. Lord Denman, in *Hansard's* case, gave other instances not less remarkable, but of more ancient date, of the length to which privilege had been carried, and without resistance, by inflicting the most cruel punishments upon persons charged with offences

against the House of Commons; yet no one, as his lordship observed, could dream of now maintaining that such powers are possessed by that body. And we need go no further to refute the doctrines sometimes ventilated during the recent discussions, denying that a prerogative could fall into desuetude. In truth, all prerogative is the very creature of use and exercise; and on this rests, and from the nature of the thing must necessarily rest, its existence.

There remains to be considered the authority of Lord Coke, which appears to have been received as sufficient, without examination, by succeeding lawyers. That no text-writer can be appealed to who is better entitled to command respect on all subjects other than constitutional law, is at once admitted. But it is singular how little he appears to have studied and weighed such points. The instances of his errors are numerous on matters connected both with the frame of the constitution and its history; nor as a legal antiquary can he be put in comparison with many others. Reference has been made in the debates to his declarations on Parliamentary privilege, and to his noted mistake respecting the descent of the Duchy of Cornwall; but perhaps the most startling proof of his never having, with any attention, examined the history of the constitution, is his assuming that the Parliament at the Norman conquest was nearly what it in the course of ages afterwards became. The ancient treatise "*Modus Tenendi Parliamentum*" has given rise to much dispute among legal antiquaries; but that any one should affirm its having been "rehearsed before the Conqueror, and by him approved for England," seems hardly credible. It may indeed be doubted whether Selden has not assigned it too ancient a date, when he ascribes it to the time of Edward III.; but its having been by the Conqueror "approved for England" is a fancy which it demands all our respect for Lord Coke to treat with becoming gravity. Nor have those who blindly follow the supposed authority of the passage in Co. Litt. 166 taken the trouble to examine how carelessly that passage is composed, and how manifest an error one portion of it contains, where a dignity in fee-simple is said to be given by a grant without words of inheritance, but followed by a sitting in Parlia-

ment; to which may be added the remark that it does not appear distinctly whether Lord Coke is describing the rights of peerage or only the honours of nobility. But the argument appears to be irrefragable of those who contend that were Lord Coke's authority ever so distinct, and ever so competent to prove what was the prerogative in the earliest times of the Stuarts, the abeyance into which it has fallen ever after, and more especially since the Revolution, is decisive, even if we were to admit its existence in Lord Coke's day, upon his authority. We need only recollect, to prove this position, that the decision of the Exchequer in Bates's case, recognising the prerogative of levying duties of custom in all ports, except London and the Cinque Ports, had Lord Coke's concurrence; although he afterwards, in the second part, condemns that decision as against law; he having become the leader of opposition to Charles I.'s government, and having indeed been by James I. committed to prison with Pym at the close of the session, for words spoken in Parliament disrespectful to the King's son-in-law. It may therefore be confidently affirmed, that the authority of Lord Coke upon this question can have no weight in the argument, and that no such prerogative as the one claimed now belongs to the Crown.

The reason alleged by the Government for granting the life peerage, and for following the precedent thus set, was the great convenience of adding to the number of the law lords, in whom substantially is vested the decision of appeals and writs of error. That there results some embarrassment from the merely voluntary attendance of all but the Chancellor, must be admitted, as must also be the expediency of more than one, or indeed two judges, sitting upon these cases. Three or five may be allowed to be more desirable; and however satisfactory the tribunal may for the most part have proved, the inclination seems prevalent in the House itself to adopt some plan of securing a more regular attendance of legal men, and possibly for somewhat amending the ordinary course of procedure. Various plans have been suggested. One is favoured by Mr. Macqueen (an authority greatly to be respected),—that of reviving the ancient practice of calling on lawyers not members of the

House, and giving them not merely the power of addressing, but of joining in the decision of causes. We conceive that this will meet with little countenance, unless all other schemes are found either to be impossible, or to fail. Another course has been suggested, in debate, of giving the Crown a power to create a limited number of life peers, as four or five, and requiring that these should have previously filled judicial stations. A third proposition has been made for transferring the jurisdiction to the Judicial Committee of the Privy Council, either wholly (to which there are the greatest objections) or partially, as provided in Lord Brougham's Bill of 1834, cited by Mr. Macqueen (p. 13). But the reason which probably has hitherto prevented such a measure from being prosecuted further, seems irresistible, that although the Lords would only in certain cases take the benefit of the Judicial Committee's assistance, and even in those would be able to decide for itself, yet the result would in all probability be to hamper the whole appellate jurisdiction, just as the extension of patent rights vested in the Committee, and without excluding the old proceeding by bill, has been found, after twenty years' experience, to have entirely superseded that course of proceeding. A fourth view of the subject has been taken by those who would more considerably extend the number of law lords, so as to make that body combine judges from all departments of Law and Equity, Common and Civil, and Ecclesiastical. Grounding their opinion upon the admitted success of the Judicial Committee, which is thus constituted, they conceive that the House of Lords, thus aided in its legal branch, should be the great court of appeal and error in all cases, and that the whole jurisdiction of the Privy Council should be transferred to it. This part of the plan, we conceive, is liable to serious objection, because it abolishes a Court which by universal consent is allowed to have worked as well as possible; and because the only reason assigned, is the desire of more symmetry in our appellate judicature, and the prevention of what may no doubt be deemed an anomaly, but which never has been found to create in practice the least inconvenience, or anything like a conflict, the existence, at the same time, of two Courts of supreme jurisdic-

tion. Some difficulty has been raised by the consideration of the Scotch causes, forming, as they have generally done, the great majority of those which come before the House of Lords. An incautious, and it is believed wholly incorrect, expression used in the debate which led to the appointing the Committee now inquiring into this subject, that the manner of dealing with these cases has been most unsatisfactory to the people of Scotland, has given rise to much discussion in that country; and however groundless the statement may be found to prove, it cannot be denied that an arrangement would be an improvement of the procedure, which gave the Lords the power of calling in the assistance of the Scotch Judges, as they now do those at Westminster Hall; and in all probability it will be deemed expedient to give the same power as to the Judges in the Courts of Equity, perhaps also as to those in the Civil and Ecclesiastical Courts.

We have deemed it our duty to describe the various plans, without being prepared to pronounce an opinion upon them. It is certainly much to be wished that the smallest possible change should be effected in the constitution of the House of Lords. This is most desirable, whether we regard the interests of the constitution, or of the law. The most absurd and even wild notions have gone abroad, in consequence of the inquiry now proceeding before the Lords' Select Committee. Zealous patriots in Scotland have avowedly patronized a recurrence to the old contention which, soon after the Union, prevailed against all right of appeal to a foreign country, as they regarded England in those days; while a more temperate class of projectors are for reviving the plan of 1806 for creating a Scotch Chancellor, and Scotch Court of Appeal, though that scheme was limited to an intermediate appeal only, and did not at all contemplate the extinction of the Lords' appellate functions. While the inquiry and the Committee have produced this agitation among our northern neighbours, in which we doubt not the Bar of the sister kingdom in the west will join, *pro interesse suo*, we observe that more erroneous notions prevail in foreign countries of the position in which the House of Lords has now been placed. The French jurists as well as politicians

regard the process as already commenced of what used to be called *peerage reform*, and which the Irish demagogues so often threatened and so constantly avoided touching. It is fancied that the judicial structure of the Lords already nods to its fall; and critics not friendly to England and her institutions give this as a proof that they are no sooner found defective than they are amended. We believe it will soon be seen that nothing can be more groundless than the views, however well meant, which these friendly critics have been misled to form, by casual expressions in debate, and by the cautious and prudent care taken of not turning a deaf ear to any complaint of grievance or abuse, without giving it a full examination.¹

We feel disposed to reciprocate (as our good neighbours phrase it) this friendly feeling, and to mark the wide difference between the position of our tribunals and theirs. The inquiry and the comments which have given rise to this error as to peerage reform have all proceeded upon the assumption that no human judicature can be perfect, and upon the fact of even our highest Courts submitting to the free discussion of their whole proceedings, and to the censure which, as the result of such discussion, they may probably be found to deserve. In all times, since our free constitution was established, this liberty has been allowed to the people out of doors and to the press. Remarks, however strong, if couched in language that is commonly decorous, have been permitted, and the force of public opinion suffered to bear upon our judicial proceedings, as much as upon any other part of our system. The Courts have profited by this, as well as the country, and the judges themselves are the last persons ever to raise their voice against the free discussion of all their proceedings. But it is unhappily not so in France; and of this we have a late very remarkable instance. The Court of Montpellier had decided that the entering a candidate's name on a card, and sending it to a voter, the election being by ballot, and the voter possibly unable to write himself, was a political writing, and required the authority of the judicial or government officers; which would manifestly operate the disfranchisement of whole classes of voters. An appeal to the *Cour Impériale* at Aix occasioned the

¹ See, *inter alia*, *Revue des Deux Mondes*, 15 Mars, 1856.

reversal of the sentence; and the Government functionary being defeated, appealed to the *Cour de Cassation*, which, to the no little astonishment of the public, and especially of lawyers, reversed the Aix sentence, and restored that of Montpellier. It may be recollected that M. Troplong is both President of the Senate and of the *Cour de Cassation*; and his zeal for the existing order of things is matter of notoriety and of no little remark. A daily paper (*Assemblée Nationale*) made some remarks on the point of law and the judgment, stated to be erroneous, of the *Cour de Cassation*; whereupon it received a warning, being the second, for it had previously been under a first warning; and the ground stated was that it had made remarks against the sentence of a Supreme Court. Thus Supreme Courts are held to be infallible, and whoever differs with them on a point of law is liable to have his property, and that of the other owners of the paper, destroyed summarily; for a third warning leads to the suspension of the paper. No more need be said to show that in France there exists not even the shadow of a free press. That among the judicial reforms contemplated by the Government, the relaxation of the existing rigour against the press may be one, we confess we rather wish than venture to hope; but how M. Troplong and his brethren can submit to be so protected, we own does pass our comprehension.

ART. IV.—COUNTY COURTS.

THE very great and daily increasing importance of local judicature makes whatever concerns it peculiarly interesting to the community, but more especially to the members of the Legal Profession; and we deeply regret to record, along with a measure of great benefit to the County Courts, a most ill-judged, and in every point of view most mischievous, proceeding, adopted by the Government with respect to them.

We find in Hansard (*House of Lords' Debates*, March 14,

1856), that when Lord Brougham urged upon the Ministers, and especially upon the Lord Chancellor, what he had for years been repeating, his complaint of the great sums levied as taxes upon the suitors in those Courts, amounting to 150,000*l.* a year, and expressed a hope that he might at length be pressing this intolerable grievance for the last time upon the attention of the Ministers and of the House, the Lord Chancellor answered that he not only once more promised the relief demanded, but could announce that it had already been granted, as he had two days ago presented a Bill, which now waited for a second reading, and which took off those taxes to the amount of about 100,000*l.*, and transferred the payment of the County Court expenses from the suitor to the Consolidated Fund. Lord Brougham, as might be expected, intimated his great satisfaction at having, after so many fruitless efforts, at last been able to congratulate their Lordships on the cessation of this Law Tax, sinning as it did against all principle, and being more oppressive and more impolitic in County Courts than in any other. But he could not have been aware of the whole provisions of the Bill, which, according to the usual course of proceedings, had not been opened to the House on being presented, a first reading being understood to be granted as a matter of courtesy, if not of privilege, to any Peer's proposal; for this Bill, when it is now printed and examined, is found to contain the very provisions against which we find by his speech on judicial statistics, as reported in the same volume of Hansard, as well as in the Journal of the Law Amendment Society, he had a few days before so strongly protested, representing the rumour as incredible which charged the Government with a design to reduce the salaries of the County Court Judges. The history of this most unaccountable error into which the Government have allowed themselves to be betrayed, must now be given.

In order to improve the constitution of these Courts,—which now carry on by far the greatest part of the judicial business of the country, trying not only an immense number of causes, in which the Superior Courts have really in practice no jurisdiction, but a larger proportion of those in which the jurisdiction is concurrent,—and in order to extend the great benefits of local

judicature, by still further increasing the attractions of these Courts, Parliament had wisely determined that the salaries of their judges should be raised, but unfortunately had left a discretion in the Treasury of apportioning the additional sum granted, so that 1,500*l.*, being the maximum, and 1,200*l.* the minimum, the selection was given of those to whom the addition was to be given, and even the amount of that addition in each case. The greatest, the most glaring, mistakes were committed in making this selection and apportionment. It professed to proceed upon the relative amount of the business done by the different Courts; but it did give the larger salary in some instances to the Courts which had the smaller number of suits. It took no account of the labour imposed by circuits, assigning the larger salary to judges who never stirred from home. Above all, it wholly disregarded the amount of labour in respect of the length of the trials, and the amount of responsibility in respect of the relative importance of the causes; indeed, the test of the number of causes, or even of the number of days occupied, or even the combined number of days, of causes, and of miles travelled, would, though rigorously adhered to, be manifestly most inapplicable to the subject matter, because the qualities required for a judge do not at all depend upon such circumstances; and the introduction of such a rule would lead to remunerating judges differently in different Courts exercising the same jurisdiction. But while all men saw the absurdity as well as grievous injustice of the course pursued, the worst of its offences was, that it placed the judges who performed the greater part of the judicial business of the country in a state of dependence upon the Treasury, utterly repugnant to every principle, and which, as soon as it was mentioned, appeared to every one a thing not to be endured. Accordingly this was in terms stated both by Ministers of the Government and others in high legal stations. The Lord Chancellor and the Lord Chief Justice both pronounced it to be altogether intolerable that the Treasury should have the power of fixing and of changing the salaries of judicial functionaries, and the Government gave a pledge that this enormity should cease.

In what manner, then, does the new Bill redeem that pledge?

No doubt it makes all the salaries equal, and fixes them by Act of Parliament, instead of Treasury minute ; and so far it removes the greatest part of the grievances. But it runs directly counter to the decision of Parliament, that such a remuneration should be given as might enable the Government to obtain the persons best qualified to discharge the important duties of the office : it in fact cuts down the salaries granted by Parliament. Parliament having said a certain sum shall be given in some cases, because it is fit that these functionaries shall be so remunerated, this Bill says that such a sum shall in no case whatever be given ; and the ground on which the reduction is made appears to be one on which every judicial salary in the country may at once be cut down. It is said that those learned and able persons who now receive the lesser salary would have originally accepted their appointments without the prospect of any increase. We believe that almost all of them have found the labour and the anxiety of the office much greater than they had expected, and that several able and learned men have in consequence declined the promotion. But we put that consideration entirely out of view, and, admitting the allegation to be true, we ask to which of the judicial places in this country the same observation does not apply ? If the Chief Justices were reduced from 8,000*l.* to 7,000*l.*, and the Lord Chancellor from 14,000*l.* to 12,000*l.*, does any one doubt that the very same men who now adorn those exalted stations would have accepted their offices at the lower salary ? But does any man doubt that, in looking for a person at the Bar to take a vacant County Court judgeship, the difference between the one salary and the other would have an effect of limiting the choice, —of narrowing the field of selection ?

But there is a further objection to the change which the Bill proposes should be made. Those who have had the larger salary awarded to them continue to receive it. The inequality, the indignity so justly complained of, continues to exist. One set of judges are told that they are regarded as inferior to another. A judge who performs more business receives less remuneration. If a vacancy happens in one of those courts, all of which try the same number of cases, and of the same descrip-

tion, and all of which are filled by judges having, in consequence, it is alleged, of that equality, the same salary, the new judge will receive a different salary from that of the others. It can hardly be pretended that this consideration will have no weight with the men whom it behoves the Government to promote,—the men best fitted for the office. We believe no one can be ignorant of the effect produced some years ago by the reduction of the salaries of the puisne judges from 5,500*l.* to 5,000*l.* Some of the best men at the Bar declined the office, because they could see no reason for the slight put upon them by being placed on a different footing from others. Such feelings are to be respected, not disregarded; they indicate the delicate sense of honour which should be cherished in men called to exercise offices that require high and even sensitive feelings, as well as learning and ability, for duly discharging their duties.

We believe a greater error never was committed by any Government than ours will commit, if they persist in this measure of utterly false economy. The County Courts are in the greatest favour with the people, a favour rapidly increasing. They are, it is to be feared, in less favour with the legal profession, because they have considerably lessened the amount of business in the Superior Courts. But with some manifest and easily-effected improvements, they may not only be rendered still more advantageous to the people than they now are,—they may be made more beneficial to the different branches of the profession. We venture to hope that a due regard to their own credit with all parties may prevent the Government from persevering in their proposed scheme; but we feel assured, that should they disregard the friendly warnings which we believe they have received, they will find the public opinion too strong and too generally prevailing to be resisted.

We may add, that we are the more convinced of the formidable nature which the opposition would assume, by symptoms which we have observed as to the position which the Law Amendment Society are prepared to take up in the contest. The society is not an agitating body, and has generally held aloof from any conflict waged in Parliament. But the important share which it has had in extending the jurisdiction of

the County Courts, and the great interest which its members generally are known to take in the success of those tribunals of the people, joined with the hints already thrown out in the *Law Amendment Journal*, induce us to believe that the society will exert all its influence, and perhaps in more than one way, to prevent the threatened reduction. That influence has always been considerable, and has been of late greatly extended by the improved organization and increased numbers of the society. A strenuous opposition inside the House, so strengthened outside of it, and in so good a cause, will not be faced by the Ministry, unless they are much more foolhardy than we take them to be.

ART. V.—THE FOUR HEIRS TO SOVEREIGNTY IN FRANCE.

THAT which perhaps most strikes the student of political history, when either witnessing such events as the recent birth of the son of Napoleon III., or reading accounts of similar births in the last half-century in France, is the sameness of tone of all those who first receive the impression of the event, and are held, in complimenting the Head of the State upon it, to represent certain fractions of the nation, or, at any rate, certain portions of the governing or administrative body. They, in many cases, can scarcely be said to vary one from the other; and yet how different is each occasion! The same servility expresses itself in the same stereotyped form, however different may be the cause which calls it forth. Senates, parliaments, legislative chambers, councils of state,—all have recourse to the same flattering language, nay, almost to the identical words, to convey to the feet of the sovereign for the time being their assurances of a fidelity which has invariably failed, and their belief in a stability which has invariably been overthrown. Whatever may have happened to teach them the hard law of human vicissitudes,—*dura lex* indeed!—they apparently indulge in an uneradicable confidence in Fortune, and deal with Eter-

nity as though they themselves had over it a compelling power. This is only to be explained by self-delusion or subserviency of spirit, carried (one or the other, according as either prompts) to a pitch that, in this country, and with the glorious development attained to by our free and national institutions, we find some difficulty in comprehending. Self-delusion, after all that has—four times within the last fifty years—occurred in France, is scarcely an admissible hypothesis ; and there consequently remains, as the cause of all that we have so lately been called upon to observe, a natural subserviency of spirit, an easy habit of servility, derived, in fact, from a depth of scepticism upon every point (religious and moral, both), which we in England shall, to our infinite honour and credit, perhaps never be able thoroughly to appreciate. But if from the individuals required to chronicle their impressions (or what are supposed to be such) we turn to the one individual to whom their impressions are conveyed, we shall find his personality strongly marked in his words, and a species of judgment formed upon the value of what it is his office to reply to. Let us, as an example, take the speech made the other day by M. de Morny, as President of the Legislative Chamber, to the Emperor Napoleon III. upon the birth of his son. Ignore altogether what had passed during his own lifetime,—forget the feeling of security with which he himself, as a *sincere* Orleanist, had been animated, eighteen years ago, upon the birth of the Comte de Paris,—that was what M. de Morny could not do ; and yet it was, it would seem, absolutely indispensable to regard the future as *made sure* of ; and so we have the phrase : “ Undoubtedly, upon other occasions, hopes, in a measure similar, have been entertained, and not realized ; why, then, should those hopes which we nourish at this moment, to which we abandon ourselves with such effusion,—why should they inspire us with such confidence ?—For this reason, namely, that the two dangers which threatened the throne,—revolution in the interior and coalition abroad,—these, sire, have been reduced to nothing by you. Revolution !—you have put it down by force ; you have drawn it from its object by employment ; you have calmed it by generosity. Coalition !—you have reconciled foreign powers with France, because your armies have covered themselves with glory *only* in the cause of

right, and for the maintenance of justice, and because you have known how to elevate France without humiliating Europe."

Now, we suspect that when he is perfectly alone with his own conscience, M. de Morny knows as well as we do where lie the immense exaggerations of all this; we suspect he is perhaps even less deceived than many others, and (to take one phrase alone) is better aware than most people how far from truth it is to affirm that the desire for freedom, disguised under the term "Revolution," is either vanquished by force, set to sleep by material benefits, or turned from its purpose by what he is pleased to denominate "generosity." We suspect he knows how things *really* stand in France more accurately than ninety-nine hundredths of the tribe of functionaries and court hirelings; yet still there is the same obsequiousness, there are the same servile expressions, and what we should like to call the same *genuflexions of language*, as in every official harangue that has been delivered since the year 1811! And how may we prove that they really are the same? What best proves to us that monotony of slavishness from which we involuntarily turn away? What best proves it is the reply of the very individual to whom it is all addressed. Louis Napoleon's answer to M. de Morny is the best criticism upon M. de Morny's speech; and if a little circumstance that has reached our knowledge be correct, this censure, to all appearance very gently applied, strikes not at the person of the President of the Legislative Chamber, but at the servility which inspires him as an abstraction. Strange to say, yet nevertheless true, by a mere chance, no copy of M. de Morny's speech reached the Emperor in time for him to frame his answer upon it! so that, in fact, the imperial reply, which so properly discourages fulsome flattery, and is, as several Paris journals ventured to remark, "so good a lesson to courtiers in general," was framed in the absolute prevision of what could not fail to exist, of an explosion of servility, which was the thing to be expected, which must unavoidably characterize the discourse to be responded to!! This beforehand-reckoning upon the extent of the platitude whereof a courtier and public functionary would infallibly be capable, is not one of the least curious features of the whole; and when we are made aware of it, it adds an increased interest to the Emperor's

excellent speech. Rushing boldly and straight upon that which constitutes the whole difficulty, the whole embarrassment of the position, Louis Napoleon wisely says :—

“ All the acclamations I hear round my son’s cradle cannot succeed in making me forget the fate of those who have been born in the self-same place, and *under analogous circumstances*. If I hope that his destiny may differ from theirs, it is only because, confident in Providence, I cannot doubt the fact of its protection, when I see so extraordinary a concourse of events combining to raise up anew what was thrown down forty years since. It is as though Providence had meant, by misfortune and by martyrdom, to give the consecration of age to a new dynasty sprung from the people’s ranks. But history, too, has lessons that I will not forget. On the one hand, it tells that Fortune’s favours should not be misused ; on the other, that no dynasty has a chance of stability but in remaining faithful to its origin, and being wholly and solely occupied by the popular interests, for the safeguard of which it was founded.”

This speech courts observation in more ways than one. First, for the *manner* in which it accepts the past, and for the exceeding unflinchingness in which it looks the situation in the face. A few words of explanation will not be wasted, for we think the extent of the Emperor’s boldness and wisdom has not, upon this point, been sufficiently appreciated in England.

The impossibility of transforming the present imperial infant into the *only* heir to sovereignty in France, the total impracticability of disguising that he is the fourth child born in the same place, with the same high destiny apparently before him, has driven the flatterers to the adoption of one only device,—that of imagining that the “ place ” being the same, the “ circumstances ” were different. This was the loophole through which all their servility was exhaled ; but the Emperor has wisely and courageously stopped up this outlet. He himself is the first, he is the *only* person who ventures to declare that not only the “ place ” was the same, but that the “ circumstances ” were also “ analogous.” Here is, in fact, the pith and substance of the lesson given to M. de Morny, and at the same time to the courtier tribe in general.

Other parts of the Emperor’s speech are equally interesting

to note : that passage, for instance, where he thinks fit to talk of his dynasty as "sprung from the people's ranks." If we and our readers had time for it, a discussion upon this would be fertile in argument; but we will only rapidly glance at one point of special interest which occurs to us. What is the principle *opposed* to the *electoral* or "popular" right?—It is the right of tradition,—the hereditary right. Hereditary right is absolutely incompatible with the notion of a right conferred by the choice of a nation, of a crown given by universal suffrage to an individual. Yet here is the double origin which Louis Napoleon is for ever striving to give to his own power,—here are the two conflicting principles which he is eternally trying to conciliate. The self-same fault (if fault it was) that the Comte de Provence committed in styling himself Louis the *Eighteenth*, that identical fault has been and is daily committed by Louis Napoleon, who styles himself Napoleon III., whilst courting favour from the lower orders—*les masses*, as the French call them,—by talking of his dynasty as founded solely upon popular choice.

The next point to be remarked (and which has been so considerably) is the assertion that the stability of a dynasty depends only upon its entire and exclusive devotion "to the popular interests for the safeguard of which it was founded." This, coupled with what have hitherto been the manifest tendencies of the present government in France, does not exactly satisfy the majority of the reflecting public. People remember, in spite even of themselves, the words uttered by Louis Bonaparte's nearest friend and confidant, M. de Persigny, to M. de Montalembert immediately after the *coup d'état* of 1851,—“You ask how we mean to govern. Two words will tell: we mean to govern *with* and *by* the masses; with or without the middle and upper classes, according as they themselves choose; *against* them, if they attempt to resist us.” Now, however we may admire or approve the policy of the Emperor Napoleon III.; however we may rejoice over our alliance with him, and feel grateful for the good faith he has kept with us throughout, we cannot, nor can any one, deny that the above programme has hitherto been strictly adhered to and carried out. The Government of France is set in movement by the lower orders,—by the masses,—to the detriment, and, in fact,

indirectly to the exclusion, of the upper and *educated* classes. This, it requires no witchcraft to discern, is to the inevitable disadvantage of the moral elevation, and to the grievous embarrassment of the financial resources of the country; and this, far from being likely to improve, is affirmed by the Emperor to be the proper basis upon which the edifice of government ought to rest. We have merely glanced at all this, because we could not leave it altogether unnoticed; and we will now return to specify the analogous circumstances accompanying the successive births of the four heirs to sovereignty in France, analogies admitted and marked out by the Emperor Napoleon himself.

If we first compare the natural circumstances attendant upon the birth of the King of Rome with those which accompanied the recent birth of the Imperial Prince, we shall find a marked resemblance. A reference to the *Moniteur* of the 20th and 21st March, 1811, and to the official announcements coincident with the recent birth, will be found to justify this remark. And according to the recollections of those who were about the Tuileries forty-five years ago, and to the ocular testimony of the persons who witnessed the recent birth, the incidents of the two confinements were the same, excepting that, science having progressed, it was possible for Dubois the son to take upon himself a responsibility which Dubois the father dared not assume without the famous question,—“Sire, which must be saved, the mother or the child?”

If we examine the circumstances, in either case dependent upon the Sovereign's will, we shall find, for the most part, a close imitation in 1856 of what took place in 1811, even to such expressions as these (identical).

“During the whole of the pains of labour, the Emperor did not cease to attend upon the Empress with the most touching solicitude.”—(*Moniteur*, 21st March, 1811.) The very words,—“*N'a cessé de prodiguer à l'Impératrice les soins les plus touchants,*” were textually copied in the official journals of the 17th March, 1856. Also we find the following in the same *Moniteur* of 21st March, 1811:—“In order to respond to the eagerness of the crowd that forces its way to have news of the Empress and of her august child, there will be every day from eight o'clock in the morning till eight in the evening, a

chamberlain on service in the first saloon of the state apartments, who will answer the questions of every visitor, and communicate to them the bulletins that her Majesty's physicians will give out twice a day." This, too, was copied literally; so was the whole of the "*cérémonial*," with, we are bound to say, some few alterations much to the credit of the present Emperor's good sense. For instance, in the ceremony of the *ondoiment*, or christening, in 1811, we find the Marshal Duc de Canegliano holding up the train of Napoleon I. !—"portait la queue de son manteau" are the expressions,—a service from which the marshals and generals of our times have been as yet exempted by Napoleon III. Various little details, too, have also been spared the French public, which in 1811 were held to be of the intensest interest; as, for instance, the following announcement of the 23rd March, 1811 :—"His Majesty the King of Rome has passed a good night, although he has been slightly troubled with colics, which are known to be inevitable at this early period of his life." (Three days old!) "This morning his Majesty is quite well." And again, of the same date :—"The colics experienced by his Majesty the King of Rome during a part of last night have quite ceased." ¹

From such puerilities as the above, to the public announcement of which the hero of Marengo and Austerlitz gave his gravest attention, we repeat it, the present Emperor has saved the French public, as also from such exhibitions as the ensuing :—

"The Senate, Council of State, and other corps admitted to present their homage to the Emperor, were received by the King of Rome during the diplomatic audience. His Majesty lay in the cradle given to him by the town of Paris; close to his Majesty stood Madame la Comtesse de Montesquiou, head governess, and the *officers on service about his Majesty's person*. The various corps were introduced and presented successively by the master of the ceremonies. The presidents of the Senate and Council of State delivered speeches, to which Madame la Gouvernante replied. The other corps were named by the

¹ See the numbers of the *Moniteur* of 22nd, 23rd, 24th March, 1811.

master of the ceremonies, and made their obeisance (*ont fait leurs révérences*) to his Majesty in crossing his apartment.”¹

From this abasement of human dignity the French functionaries of the present day are saved; but if we compare the addresses of the legislative bodies,—Senate and Council of State, for example,—we shall be struck by the much greater amount of platitude shown forty-five years ago, than has even been manifested now. The comparison is certainly not divested of interest, and those of our readers who have not the official journals at hand, may be curious to see in what language, at the period we allude to, was expressed a belief in the continuation and stability of the Bonaparte dynasty, so rudely overthrown three short years later. Here is the speech addressed by the Senate, on the 22nd of March, 1811, to his Majesty the Emperor and King.

“SIRE,—The Senate offers to your Majesty its lively and respectful felicitations upon the great event which fulfils all our hopes, and insures the happiness of our latest descendants (*nos derniers neveux*). (!) We come, the very first, to lift up to the foot of the throne the echo of those transports of joy, of those cries of delight that the birth of the King of Rome causes to burst forth from all parts of the empire. Your *peoples*” (the plural must be admitted—*vos peuples*) “hail with unanimous acclamations the rising of the new planet (*ce nouvel astre*) that is just visible on the horizon of France, and whereof the first ray has dispelled, even to the very last shade, the darkness of the impending future (!) (*dont le premier rayon dissipe jusqu’aux derniers ombres des ténèbres de l’avenir*). Providence, Sire, which has so visibly guided your exalted destiny in granting this first-born of empire, means thereby to teach the world that of you will spring forth a race of heroes, (!) a race no less durable than the glory of your name, and the institutions of your genius. (!)

“From the height of that throne, where it is given us to contemplate sovereign majesty in all its pomp, how often have you let us hear those noble and touching words,—that the welfare of your peoples is the first of your heart’s desires. A

¹ *Moniteur* of 23rd March, 1811.

husband now, and father, your domestic affections are confounded with those you bear to your subjects. The august Empress, who enhances the splendour of her crown by so much grace and virtue, is now doubly dear to you as the mother of the prince *who is to reign over the French*; and when your paternal eye rests on the King of Rome, you reflect that on that precious head reposes the future fate of the nation so constantly present to your mind.

“ Allow the Senate, Sire, to blend together its sentiments and duties, and not to separate from its respectful tenderness for the son of the great Napoleon the holy obligations that attach us to the heir of the monarchy; as also in the homage we present to your Majesty, we do not separate the humble offering of our love for your sacred person from the tribute of our profound respect and our unshakeable fidelity (*inébranlable fidélité*).”¹

Before proceeding farther, we must just remark that these are the very men whose defection, when the hour of trial came, so very soon after, rendered the idea of the King of Rome’s succession to the throne impossible!

With a few (a *very few*) changes of phraseology, with a little less servility of expression, we have here the speech delivered to the Emperor only the other day by M. Troplong, in the name of the now-existing Senate. But the answer of the Sovereign addressed is not the same. The tone of the first emperor is distant and haughty; and in both Bonapartes may be discerned the same contempt of mankind in general, which is, as it were, the fundamental basis of the character of each. But the first Bonaparte has no doubt of the future, and accepts all the auguries for his son’s prosperity and power in a manner which the present one is far from assuming. In answer to the speech above quoted, Napoleon I. spoke the following few sentences:—

“ SENATORS,—All that France manifests for me under present circumstances goes to my heart. *My son’s great destinies will be fulfilled.* With the love of the French all will be possible to him. I accept the sentiments you express.”²

The Council of State, like the legislative and administrative

¹ *Moniteur*, 23rd March, 1811.

² *Idem*, *ibid.*

bodies of our own day, declares that "the King of Rome, brought up by his mother, who is the model of all virtue and grace, and under the eyes of the first of legislators and greatest of military commanders, will perpetuate their genius and virtues, and inspire the remotest descendants of the speakers with the same sentiments of admiration and respect with which they" (the speakers) "are filled for his august parents." To this Napoleon I. replies:—

"My son will live for the happiness and glory of France. Our children will devote themselves to *his* happiness and glory."

Nothing more,—nothing less! He has not a doubt of the future; and the man who four short years after is to be condemned by united Europe to the solitude of a rock in the middle of the ocean, sees not a shadow darken the fate of the child who is to grow to man's estate under the close watching of foreign eyes, and die out imperceptibly in what must be termed the captivity of a foreign land!

One thing, however, should be remarked; namely, the real, the *genuine* enthusiasm manifested by the population of Paris, and indeed of all France, upon the announcement of the birth of the King of Rome. The situation of the first Napoleon was one *unique* perhaps in history, and which, as long as it remained *unique*, was capable of exciting almost unanimous devotion to his person. Right or wrong, royalty had been held to be synonymous with injustice, and the nation had impatiently revolted against what it might have been easy to reform. Between royalty and the French nation the breach was thought by every one to be irreparable and eternal; consequently, as a remedy to the insupportable horrors of the Republic, no one looked towards a restoration of the Bourbon family. France suffered agony and martyrdom; she hated and execrated her tyrants, and really and truly sighed for the advent of one who should set his heel upon their head. That did Napoleon Bonaparte, and the event of the 18th Brumaire was hailed by all parties, by all ranks, by France whole and entire, as a delivery, as a promise of salvation. There were no two opinions regarding Napoleon at that moment—it was not that some said, "he is a usurper," whilst others defended his conduct; nor did his

adherents declare he had done rightly, whilst public opinion styled him perjured and felonious. No! There was no diversity of opinion as to what he himself had done, neither were there two opinions as to the worth of the men he had driven from power. Public opinion tended but one way, saw but one thing—the absolute necessity of what the young Egyptian general had done; and no murmur was raised to dispute the usefulness, the indispensability of his act. The situation itself was so thoroughly abnormal a one, that things had no more their wonted signification, and license and disorder having grown to represent tyranny, despotism became the emblem of liberation. Glory followed rapidly upon the first Napoleon's elevation, and for a few years France forgot the possibility of every other requirement or want in the gratification of her vanity and ambition. Besides, another reason is evident for the popularity of the Emperor during twelve or thirteen years. People believed in the foundation of a new race; they did not entertain the remotest notion of a restoration of the old reigning family; they scarcely knew whether any of its members existed; the Comte de Provence and the Comte d'Artois were personages mythical in the thoughts of the mass, as was the murdered dauphin in the Temple. They did not look backwards, but on the contrary so resolutely forwards, that, till the marriage with Maria Louisa, they were in the contented anticipation of one of Napoleon's brothers, or of a prince merely adopted by the Emperor, succeeding to his throne. When, therefore, the King of Rome was born, all France *did* incontestably hail the event as the most auspicious that could happen, and nothing *distracted* the country from its deep and perfect joy. We have been allowed to copy a few lines of a letter written on the 21st of March, 1811, by a gentleman resident in Paris, to one of his friends in the provinces. The following passage occurs in it:—"No words can describe the effect; I was on the Boulevard Montmartre at the time, and consequently commanded a vast line of the Boulevards before me. It was between nine and ten in the morning—crowds of people were hurrying to and fro—all at once, boom!—a gun is fired! My dear friend, it is no exaggeration to say the passers-by were turned to stone! we stood and held our

breaths and counted! not a man moved along the whole of the Boulevard! not a cart or a carriage but stopped and stood stock still! We counted, I tell you, and nothing else; and when the twenty-first gun was fired, and we heard the twenty-second, the shout that burst from the lungs of all Paris, the cry of '*Vive l'Empereur!*' that made the house-windows shake, was one to have deafened the angelic choir."

The person to whom this letter was written is dead, but it has been preserved amongst family papers by his nephew, who succeeded to his fortune, and who, in 1811, was a young man, a student at the *Ecole Normale*. His commentary upon the above letter is as follows:—"What the writer says is true to the minutest point, and the effect he describes was, I believe, perfectly general. I lived on the other side of the water, in the environs of what you now call the *Quartier Latin*; and so remarkable was the sudden 'turning into stone' of the people upon the sound of the first *coup de canon*, that it never ceased to fill my recollection until the opera of *Robert le Diable* was brought out twenty-three years later; and when I saw all the nuns transfixed in their several attitudes, I could not help exclaiming (much too loudly), 'Good God! that is just what we all did in 1811!'"¹

This—a state of the public mind which every document of the time substantiates—sufficiently proves what the national enthusiasm was; and we are enabled to state that the following paragraph in the *Moniteur* set forth, without exaggeration, what had really taken place:—

"All the night that preceded the Empress's happy confinement, the churches of Paris were filled with immense crowds, praying for their Imperial Majesties. The very instant the cannon was heard, the inhabitants of Paris poured from all parts into the streets, and counted the number of guns fired with an eagerness nothing can paint, until, at the twenty-second, one immense cry told their unanimous joy at the fulfilment of all their hopes, and *at the certainty vouchsafed them now of the perpetuity of their happiness.*"

And yet this very Parisian people, so delirious with joy at its

¹ This has been rendered literally from the French original.

Sovereign's good fortune, so apparently attached to his destiny, and one with himself, is, in its intense desire to *get rid of him*, the cause, four years later, of his utter and irremediable ruin !

Inasmuch as succeeding events have proved how lamentably true is, in France, the phrase, "*tout arrive*;" and since each original picture of its modern political history has generated at least one copy, there is interest in comparing the two recent epochs to which we have been alluding, and noting the slightest feature of resemblance, or the reverse, between them. For instance, when viewed by the light of we hope our definitive alliance with France, how strange it is to find the record of how the two nations felt towards each other upon the occasion of an event similar to that which took place some few weeks ago ! The *Moniteur* of the 27th March, 1811, in a paragraph dated *Cherbourg*, says :—"The English, who, notwithstanding their pretence of blockading our port, cannot prevent the constant arrival of ships, must have heard from their own vessels our shouts and songs of joy, and must have quivered with jealousy and rage."¹ And two days later, in a despatch from Boulogne, the same official journal, after alluding to the public rejoicings, remarks that, "the wind setting that way, the sound of the French guns upon the ramparts was instantly borne across to the English shore."

This fact is equally noticed in our English paper *The Star*, of the 21st March, 1811, which says,—"*It is supposed the French Empress has been confined,*² for yesterday the French batteries fired great volleys of rejoicing ; and according to the number of discharges, it would seem that the Emperor had a son."

Now of the four births, imperial and royal, which have taken place during the last forty-five years in France, two, viz. that of the King of Rome and that of the Duc de Bordeaux, were significant to the popular mind. The first meant, "The French nation has *broken with* the Bourbon race,—a conqueror has come, who governs with a strong hand, reaps glory throughout

¹ *Moniteur*, 27th March, 1811.

² This is copied from the *Moniteur*, which of course only alludes to Napoleon by his title of *Emperor*.

the world, and whose descendants will rule over France : this is sure, and the hand of Providence is manifestly at work." The birth of the Duc de Bordeaux meant, — "The French nation has *not* broken with the Bourbon race, because all its really *national* greatness is indivisible from the *national* dynasty of the Capets, from the descendants of Louis IX., Francis I., Henri IV., and Louis XIV.; the Revolution was a mistake, and the reign of a foreign conqueror, of the Corsican usurper, a mere passing incident : this is sure, and the hand of Providence is manifestly at work." These two opposite significations were similar in kind, and each might and did find enthusiastic partisans,—partisans who proclaimed and who *believed* in the *definitive* character of the past event. But when other analogous, but not identical, occurrences took place, what was the signification to be given to them? Above all, what was to prevent them from seeming as mere copies of former events, which, it was now proved, had in fact had no *definitive* character? The return of each was in future only a mark of instability; for the King of Rome having been replaced by the Duc de Bordeaux, why should the son of another Bonaparte not be succeeded by the son of another Bourbon? Why should not the descendant of Henri IV., or the grandson of Louis Philippe, once more restore to France what their forefathers restored? We are not here examining by any means the probabilities or improbabilities of the thing itself, we are merely stating what must naturally have been, since 1830, 1848, and 1852, the arguments, more or less, of all parties, and what must inevitably militate against the notion of *definitiveness* attaching now, in France, to the establishment of any dynasty whatever.

Let us now follow the chronological order of events, and revert to the birth of the second heir to sovereignty in France.

On the 29th of September, 1820, the *Moniteur*, at five o'clock in the morning, had the following announcement:—"We suspend the press. The cannon fires. Her Royal Highness the Duchess de Berry is confined of a prince."

The witnesses to this birth were, amongst others, Suchet, Duke d'Albufera, a marshal of the Empire; and, as he him-

self says in his deposition, "several national guardsmen, who arrived before him."

And now, if we follow step by step the details of what took place in the royal mother's chamber, we shall find an instance of the imitation of which so recent an example has been furnished by another race; the child that descends from Henri IV. must be dealt with after the fashion which tradition represents as having been adopted for the *Béarnais*. "No sooner was the infant born," says the first *femme de chambre*, Madame de Cazeau, in her deposition in the *Procès Verbal*, "than some Jurançon wine and a clove of garlic were brought, and her Royal Highness desired that her son might be made to drink of the wine, and might have his lips rubbed with the garlic! And this was done, and by the King himself, who had just come into the room."

Here is for ever the same rage for linking the new-born babe with ancestors to whom he is not destined to succeed! The same determined wish to direct the first steps of the barely living being into the foot-prints of a dead and gone Past,—foot-prints effaced, washed out by the tide of events, and discernible only on the ever-shifting sand, to the eye of superstition! The same feeling which, on the 16th of March last, prompted the copy to be made of all that had been said and done in March, 1811, produced, in 1820, a repetition of what had, by mere chance, occurred at the birth of the glorious chief of the Bourbon family nearly 300 years before!

Unfortunately—and we cannot avoid remarking it here, for it is a thing not to be left unnoticed—unfortunately this narrow, puerile attachment to obsolete customs, wholly without significance in our day, is one of the most signal weaknesses of the so-called Royalist party, and this clove of garlic and *vin de Jurançon* are, after all, but emblems of the political acts of faith of the majority of Legitimists in France, if not of the Prince who personifies their hopes. We suspect that if the Comte de Chambord had a more substantial resemblance to his great ancestor, the days of the Revolution of June, 1848, would have terminated otherwise; yet we do not doubt his readiness to imitate Henri IV. in a hundred small ways; such as, for in-

stance, repeating the famous wish that "every peasant in France should have a fowl in his soup-kettle," or swearing by *Ventre Saint Gris* any given number of times, like the hero of Ivry and Moncontour! But crowns and sceptres are not secured or reconquered thus; and without meaning to be drawn into any active political discussion, we cannot help making this remark, which is suggested to us by the Duchesse de Berry's *Jurançon* and garlic.

Impartiality obliges us at the same time to confess, that between the language of the *Moniteur* and the etiquette observed upon the occasion of the births of the first and second heirs to sovereignty in France, the advantage of real dignity and simplicity is entirely on the side of the latter. It is impossible to be more quiet, and indeed *homely*, than is the entire circumstance of the Duc de Bordeaux's entrance into the world: there is no gaudiness or pomp, no trumpet-blowing, no searching after effect; and when the *Moniteur* for the whole month after has been carefully spelt through, one is forced to admit that upon such an event it could not possibly say less.

It is true that at the moment the Duc de Bordeaux was born, France was governed by one of the very cleverest men who—if you except the present Emperor—were ever at her head. Louis XVIII. was every inch a king, in every sense the word can have, and he knew how to be patriarchal so well, so thoroughly, that no one could for an instant fancy he was playing the part—nor perhaps indeed was he. The enthusiasm, which was far less for this second birth, than for the birth of the King of Rome, was of a much more *intimate* character; and certainly no one who witnessed the scenes of the few days following the 29th of September (and on this point we have consulted persons of *all* parties), no one could believe they beheld any but a close interchange of loving good-will between a confiding nation and a popular king. No one passing through Paris in October, 1820, would have credited a prophecy, if ventured on, as to July, 1830!

Peculiar circumstances, too, attached a peculiar and unusual interest to the person of the prince's mother. So very young a widow, so cruelly bereaved by the assassination of her husband,

was a fitting object for the liveliest sympathies of the French ; and during the entire reign of Louis XVIII., and until the foolish narrow-minded policy of his successor had estranged the nation from the Bourbon race, the Duchesse de Berry remained universally and deservedly popular. Besides her exceedingly liberal opinions, the courageous, high spirit of Marie Caroline endeared her to a people who in fact put valour above every other virtue ; and the approach of her confinement was really hailed by *the masses* with enthusiastic well-wishings. The existence of this popular sympathy was, during the last months of her pregnancy, the great consolation and support of the widowed duchess ; and she so ardently reciprocated it, that her intention had been, as soon as the child was born, to arise from her bed, and wrapping herself up in a mantle, throw open the windows and herself present the heir of the throne to the crowds assembled in the gardens of the Tuileries. This she was of course prevented from doing, but four-and-twenty hours after her delivery she insisted on her bed being moved to the window facing the garden, and distinctly heard the cries of joy that welcomed her son every time he was shown to the multitude. This occurred repeatedly ; for not only did the people clamour to see the new-born prince, but neither the royal family nor the medical attendants allowed any consideration to be an obstacle to perpetual exhibitions of him to the people. From the hour of his birth—or rather from a very few hours after that event—till his mother was able once more to show herself in public, the infant Duc de Bordeaux was usually called for once or twice in each day, and brought either by Madame de Goutant, the *gouvernante*, by the Dauphin, or by the King himself.

There can be no doubt that the manner of imparting the news of the birth to the people of Paris in the first instance is on this occasion infinitely simpler than in the case of the King of Rome. At an early hour of the morning of the 29th September, Louis XVIII. returning from his niece's chamber to his own apartments, caused the window of the great balcony to be opened, and came out upon it. The enthusiasm was immense, and would seem for the time to have been sincere and

heartfelt. Silence is reported to have been obtained with some difficulty. However, upon the King's repeated signs that he was about to speak, the cheers and cries were at length hushed, and in a loud and distinctly audible tone, Louis XVIII. pronounced the few following words:—

"My children—your joy increases mine a hundred-fold. To-day a child has been born unto us all." (Here a tempest of applause interrupted him.) "This child," added the King, as soon as he could be heard anew, "will be one day a father to each one of you—he will love you as I love you, as all of mine love you!"

The *Moniteur* of the 30th September, registering the above incident, observes:—"It is impossible for us to describe the impression made by these words, *but we do not hesitate to affirm that they will never be effaced from the memories of Frenchmen* (!) and that, transmitted from age to age, they will find in the hearts of our remotest descendants an echo no less grateful than in our own" (!)

Alas for human stability and human foresight! the words of Louis XVIII. were so perfectly "effaced from the memories of Frenchmen," that, just ten years later, the infant whose entrance upon the scene of this world was the occasion of so many popular demonstrations, was driven forth from France with all his family to seek in foreign countries an asylum against that blind hatred whereof he had grown to be the object in his own. And yet, *at the moment it uttered them*, the words above quoted from the *Moniteur* seemed true, and the then reigning family of France appeared certain of an unclouded fortune. As with the King of Rome so with the Duc de Bordeaux, a stable dynasty seemed assured to the French nation, and for the second time within but nine years, they abandoned themselves to a feeling of entire confidence in futurity. Even as in 1811 the Senate declared to Napoleon "that a race of heroes sprung from him would reign over France," and that "the *perpetuity* of his subjects' welfare was insured," so the different courts of magistrates in 1820 protested to Louis XVIII. their belief in the *definitive* character of the political situation in the following terms:—
"The race of Saint Louis will not perish. A child is born who

insures the destinies of France, who insures the perpetuity of the monarchy"!! And at both these two first births of the heirs to sovereignty in France, we find absolute confidence the distinguishing characteristic of the public and of the reigning family. Louis XVIII. has no more doubts than had Bonaparte. Each believes firmly in the principle in virtue of which he reigns; and the victorious soldier who proudly affirms that "his son's great destinies will be accomplished," is not more radically certain of his fortune, and counts not more implicitly upon the favours that are to be eternally reserved to his race, than does the veteran king, who, holding in his arms the infant but two days old, says, whilst exhibiting him to the crowd, "You and I shall *always* love him dearly"!! Under circumstances such as above considered delusion is pardonable; but it is, it must be confessed, more explicable in the two instances we have just recorded, than in those that follow, and the very existence of which would almost tend to prove that nothing, in reality, is to be counted on, and that the French apothegm is true,—"*Tout arrive.*"

Under the first Napoleon, as under the Bourbons of the elder branch, we find equally the dominant influence springing from the conviction of a providential order of things,—the "hand of Providence,"—the "will of Providence,"—the "*unmistakeable* direction of Providence;" these are the ever-recurring sentences explicative of the strong faith expressed in the duration of what each several party regards as indispensable to the salvation of France. But with the Revolution of July this changes; there is no longer any pretext for adverting to the protection of Providence; a fact stands in lieu of what in both preceding cases is represented by a principle; the form of faith in the future is different, but the existence of the faith itself is as strongly indicated and expressed. The birth of the Comte de Paris, in August, 1838, is also, in many respects, not to be compared with the two preceding ones, or with the birth of the son of Napoleon III. Had he not been born, there was no failure of a direct heir, and the Duc d'Orléans had brothers enough, liberally educated, popular princes, to reign in his stead, should he die without heirs; consequently, the Duc d'Orléans'

son was not waited for and longed for by the adherents of the Government of July, as was the Duc de Bordeaux by all monarchists,—the King of Rome by nearly all Frenchmen,—and the present Prince by all imperialists. Still, the same assurances were given by the so-called *corps de l'état* to the sovereign, of the future destinies of his grandson, as were given to the Emperor Napoleon on the birth of his son, and to Louis XVIII. on the birth of his nephew; and August, 1838, offers a complete parallel, as far as self-delusion goes, to September, 1820, and to March, 1811.

Our object in these few pages has been, not to prove that past examples predict for the *de facto* Imperial Prince a fate similar to that of his three predecessors (for we do not exactly believe this to be the case), but to remind our readers how remarkably analogous have been the circumstances under which all the four heirs to sovereignty in France have been born, and to show how wilfully blind must they be who do not recognise that fact,—how servile they who seek to represent the “circumstances” as having been dissimilar. We rather incline to believe that the son of Napoleon III. has a better chance of succeeding to the French throne than either of his three predecessors; nevertheless, it is absolutely impossible to deny that *each* of the three, when coming into the world, seemed to have as good a chance as himself; therefore, whilst commenting upon the instability of fortune thrice exemplified in the contemporary history of France, we cannot avoid blaming the courtier-like obsequiousness of the men who, upon every occasion, disguise truth to flatter the sovereign, and to serve their own fancied interests; nor can we resist giving to Napoleon III. due praise for having, upon the last occasion, boldly announced the truth, and proclaimed that the successive heirs to sovereignty in France, born within the present century, and of whom not one has mounted the throne, were born in circumstances “*analogous*” to those which attended the birth of his own son.

- ART. VI.—1. THE REPORTS OF THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES (1854, 1855, 1856).
2. THE LAW OF CHARITIES, *comprising the Charitable Trusts Acts 1853 and 1855; with a Digest of Cases.* By PHILIP FRANCIS, Esq., Barrister-at-Law. Second Edition. London: John Crockford. 1855.
3. THE ENDOWED CHARITIES; *with some Suggestions for further Legislation regarding them.* By J. P. FEARON. London: Longman and Co. 1855.
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IT will be of little use to codify, simplify, purify, or in any mode to reform the Laws of Great Britain and Ireland, if no precaution is taken against the invention of new statutes, which are bad in themselves, as not performing what they profess, or productive of bad consequences, as involving the necessity for burdening the Statute Book with Acts to repeal, wholly or in part, Acts to amend, Acts to extend, with all their combinations and complications.

If the fountain of bitter waters is not to be itself dammed up or turned away, whilst we are filtering and cleansing the contents of the ancient reservoir into which it has been flowing, and is now, alas! copiously discharging itself, we may as well give up the nauseous task at once, and leave the past floods to be duly augmented with the present and future congenial currents. The legislation as to charitable trusts is an example of bad modern law-making, which it is well worth while to notice.

In the session of 1853 was passed the "Act for the better Administration of Charitable Trusts."¹ As a natural legislative consequence, another "Act to amend the Charitable Trusts Act, 1853,"² was found necessary in the year 1855; and the reader will presently see that an Act further to amend both of the former is yet essential—if, indeed, the laws relating to endowed

¹ 16 & 17 Vict. c. 137 (sixty-eight sections).

² 18 & 19 Vict. c. 124 (fifty sections).

charities are to be really rendered practically of that use of which they are susceptible.

The history of recent legislation on this question exhibits some of the worst features of modern law-making. It shows, in a forcible manner, how, from party exigencies, and through private and corporate interests, the most useful measures may be vexatiously impeded, the most honest purposes misrepresented, and how Acts of Parliament may, after being denuded of their most useful provisions, to the grievous detriment of the public, be introduced into the Statute Book.

It will not, we believe, be altogether useless briefly to trace out what our governing powers have done and left undone in legislating upon charities. We shall see that evils which have been exposed and admitted *ad nauseam*, remain yet in full force; and that the common-place sophistry and vulgar cries, which nearly fifty years ago were powerless to withstand the vigorous onslaughts of Brougham and the convincing arguments of Romilly, possess the vitality of an evil genius, and are still kept in store ready to be employed whenever it shall please vested interests and their Parliamentary representatives to evoke them.

We need not now review the preliminary steps which were taken at the beginning of the present century to awaken public attention to the facts that charitable trusts were being grossly abused, and that no adequate control was exercised over them, except, indeed, when the Court of Chancery interfered, and thereby impoverished the larger and totally extinguished the smaller endowments. It will be remembered, however, that Sir Samuel Romilly's Act to provide a summary remedy in cases of abuse of charitable trusts, was passed in 1812, and has doubtless proved a valuable enactment, so far as it was applicable; but it was and is totally inadequate for those more extensive purposes which Lord Brougham, a year or two later, clearly pointed out, and undertook effectually to carry out, after full inquiry had been made.¹

We may assume, then, that the series of efforts and investi-

¹ See his Letter to Sir Samuel Romilly, M.P., upon the Abuse of Charities, 1818; also vol. iii. of "The Speeches of Lord Brougham."

gations—which, by the way, has cost the country nigh upon a quarter of a million of money, and which has for the present terminated in the imperfect measures of 1853 and 1855—was commenced by Lord Brougham about 1816. In 1837 the final Report of the Commissioners upon Charitable Bequests was made, disclosing such a state of circumstances as rendered it clear that the matter should be taken in hand forthwith. Seven years afterwards, the Government being pressed on the point, promised to bring in a measure *next session*. And now begin the parliamentary scandals.

In the session of 1844 Lord Lyndhurst, then Lord Chancellor, first introduced a Bill relating to charitable trusts; and if it were not disgraceful and mortifying, it would be almost amusing to see how during the next nine years the Houses did nothing but talk, and reciprocate abortive Bills to each other; and how, after the lapse of that time, they managed to stultify themselves by the statutes which they actually passed. The Government, on the first occasion, just alluded to, certainly did not undertake the important question with any warmth or determination. The Bill was introduced late in the session,—an accident which frequently occurred subsequently. It related only to endowments not exceeding in value 100*l.* per annum. Nevertheless the yearly value of the property thus embraced by its provisions amounted to upwards of 80,000*l.* With a candour which perhaps bears some resemblance to indifference, the Chancellor said, with respect to his scheme, that if any noble lord could propose a better, he would gladly adopt it and renounce his own,—which, very possibly, might not be the best. There is, however, one remark in his speech, which, occurring on the outset of these debates, deserves notice, not only as being indubitably true, but as lying at the very basis of the proposed reform. In referring to the practical lack of any superintending control over the charities which he proposed to deal with, Lord Lyndhurst said that the “evil could only be provided against by giving to *some tribunal a summary jurisdiction* to regulate these charities.”

Lord Lyndhurst’s Bill, being thus languidly introduced, was not very bravely supported. The Bishop of London “concurred in

its principles," but entreated the Chancellor not to pass it through committee during the present session. They wanted time to "deliberate on its provisions;" many of the bishops were in the country; "no measure affecting the Church, or the interests of education as connected with the Church, ought to be passed at a period of the session when they were unavoidably absent;" and he begged that the Bill should be postponed till "early next session."¹ Lord Campbell echoed this oft-repeated prayer for delay, with, of course, a passing reproach at the men in office for past neglect, and a doubt about the formidable powers proposed to be given to the Commissioners. To all which remarks the Lord Chancellor replied, that "some such measure had been recommended eight or ten years ago by the Commissioners of Inquiry into Charitable Bequests, but nothing successful had been done as yet with respect to it." He then stated that it was *not* his intention to take any further steps in the matter during the session. Thus ended, in 1844, the first scene of the farce—very popular at St. Stephen's—which we may entitle, "Wanted a Statute for regulating Charitable Trusts; or, How to make and mar a Law."

In April, 1845, Lord Lyndhurst again offered a measure, resembling the former one, to the consideration of the House, and on this occasion made a statement so luminous that there could be no excuse for any noble lord's being unaware of the condition and history of the whole question, or, one would think, being doubtful as to approving the remedy proposed to be applied. Lord Lyndhurst told the House² the well-known history of the previous legislative efforts in relation to the question up to that date; how, in 1818, Lord Brougham had procured the appointment of a Committee to inquire into the charitable trusts in England and Wales; how the commission had been renewed from time to time until 1837; how there were thirty-eight huge folio volumes of Report, containing above 28,000 pages,—a digest of all the procurable information in relation to endowments throughout the country; how "*it was always imagined* that this Report would be followed by some legislative measure;" how a Committee of the Commons

¹ Hansard, vol. lxxvi. p. 1160.

² Id. vol. lxxx. p. 766.

was appointed in 1835 "to consider the propriety of legislating" upon the facts already presented to them; how "some attempts at legislation were made, but were attended with no practical results;" and how there were 25,000 various endowments distributed throughout the country, with incomes of less than 50*l.* per annum, as to which it would be absurd for any person to attempt to apply the machinery of the Court of Chancery, unless, indeed, he were interested in their spoliation, more or less complete; and then the noble lord stated again that the principle of the Bill which he had prepared was "to establish a tribunal that will administer justice in all those small cases to which the Court of Chancery is practically inapplicable." It would have been well if this principle had been then accepted and maintained; but political opponents are wont to judge of the value of measures proposed by each other in proportion to the jealousies which exist between them, and the hopes which each side mutually cultivates of damaging the other and securing office for itself.

And so the debate proceeded. The usual *dramatis personæ* of that day acted their several parts,—Lord Brougham supporting the Bill, whilst he pointed out certain defects in it,—Lord Cottenham, not well affected towards the scheme, saying sententiously and truly enough, that "an efficient remedy for such evils required the most serious investigation,"—and Lord Campbell detecting in some of the provisions proposed, as he conceived, monstrous mischiefs. It was accordingly referred to a Select Committee, whence it issued amended, and was passed; but not without sundry deprecations again on the part of Lord Cottenham, who complained that the power given thereby to the Commissioners exceeded any he had enjoyed even as Chancellor. His lordship's dread of Commissioners' tyranny turned out to be groundless, for the child of so many parents died of doctoring and delay, and expired, without giving any further trouble, in the arms of the proper officer of the House of Commons.

In 1846 the Bill was again revived by Lord Lyndhurst; but new foes with old weapons (which were supposed to have been broken to pieces years back) were brought out of the museums

of antique engines of warfare, and burnished up for the combat which was to take place in the House of Lords. The result was, that the hereditary legislators of the kingdom, notwithstanding all they had heard, said, and done before, sagely determined now, that it was better to file a bill in the Court of Chancery in respect of a charity of 5*l.* a year, than that the tyranny of an inexpensive procedure should be imposed on the public; which they affected to think might uproot society, while it ostensibly was preventing the perversion of trust property. The influence of worshipful companies (who wished to be left alone to manage their charities comfortably) had now also been brought to bear on the august assembly, and the opportunity afforded by their grumbling was thereupon taken to throw the imputation of unpopularity on the projected measure. Sundry unnecessary postponements having been procured, the second reading was duly moved by Lord Lyndhurst, who said it was no pleasant task to him again to go over the whole question—*renovare dolorem*;—nevertheless, in his masterly manner he did review the objects and character of the Bill, giving some amusing illustrations of malversation, by which the gastronomy of trustees had been cultivated at the cost of the hungry *cestui que* trust. He closed his speech by declaring that it would be a feeling of *shame* with which he should contemplate the refusal of the House to read such a Bill a second time. However, Lords Cottenham and Campbell opposed the Government as usual; and this debate indeed serves to illustrate the mode in which useful and necessary measures like the one in question may be retarded, neutralized, or annihilated, when party feeling is strong, and Government weak. In the present case the Whigs were, we suspect, in the discreditable position of impeding a useful measure for their own ends. It is curious (but instructive) to see how an important question, which really was independent of party, was made a field whereon political animosities might display themselves. The vexatious opposition in this case to Lord Lyndhurst's Bill had one good result,—it called forth Lord Brougham, who reminded the antagonists of the Government of the party history of the case.

“Speaking as a Whig,” says Lord Brougham in the debate,

"I beg to ask you, Do you remember the controversy of 1818? Did you ever hear of the debates in Parliament on this very subject in the years of grace 1818, 1819? Did you ever hear of a party measure as completely a Whig measure as any that was ever brought in by that party—the Charity Bill of 1819, upon which you were banded as one man, with myself for your leader? Now every one of the topics which have been heard to-night from my noble friends, are to be found in the speeches of the Tory party to whom we were opposed on that occasion. . . . On that occasion I had the satisfaction of defeating Lord Eldon, the legitimate predecessor of my noble and learned friend. A majority of two and I carried my Bill. What, then, I beg to inquire, is the cause of the Whigs voting against us to-night? . . . I do not say this is a trap, a pitfall, a stratagem; it is only a little attempt to hurt the Government, to mortify the Chancellor (though God knows he of all men has least cause to care about such petty mortification!), to damage the Prime Minister without turning him out." . . . His lordship then added truly enough, "You do not deny the abuse—you do not say the measure is not required—you do not say that it is not a measure wished for and called for by the country; and therefore, approving its principle, the course which you ought to take is, fairly, candidly, conscientiously, and honestly, to go into committee, in order that you may there examine its details," &c.

It is not necessary to follow this debate much further. Lord Campbell naturally addressed a few words to their Lordships, not so much to discuss the measure before the House, as "because," said he, "I have been taunted with inconsistency by my noble and learned friend;"—and then, in the usual style of debate in those days, he passed on to a wordy war with Lord Brougham and a defence of the Whigs. The House of Lords was then entertained by having every objection to efficient interference with the trustees of charities reproduced—the dislike to it by the trustees themselves—the jealousies of Churchmen—the frightful violation of the independence of Dissenters—the danger of commissioners exceeding their powers—and various other commonplace complaints; and then—the second reading

of the Bill was negatived. The close of this not very creditable piece of parliamentary tactics is contained in few words in Hansard. "Contents, 40; non-contents, 42; majority, 2. House adjourned."

The next epoch in the history of abortive attempts at legislation for the management of charitable trusts was under the auspices of that party which mainly had contrived to defeat Lord Lyndhurst's measures: it would be tedious, however, to follow Lord Cottenham's divers failures. His Bills were perhaps never worth the passing. They were not framed on a comprehensive principle, and besides being in themselves imperfect, it was so contrived that they miscarried session after session for three successive years, at various periods of their parliamentary existence.

One would now have supposed the subject had at any rate been ventilated enough. The necessity for legislative interference seemed to be generally admitted, except indeed when a specific remedy was proposed; for on any such occasion timid "interests" found tongue, and protested against the cruelty of inflicting upon them efficient control. Yet another Commission was still deemed necessary, and so in 1849 one was constituted, and, as it turned out, was of some practical advantage. In their report the Commissioners repeated what had been notorious for many years; viz., that the administration of charitable trusts throughout the country required some public supervision, and suggested certain provisions, which should be incorporated into a statute: thus the basis of the much-needed statute seemed again laid. This, however, did not prevent another period of law-making slips. The session of 1850 witnessed another Bill on the subject, which passed the House of Commons, but was too late for the House of Lords. The Bill of the following session (1851), on the other hand, went through the Lords; but of course it was too late to be passed by the Commons.

In 1852 again, the same Bill as had been introduced the previous year, was again brought forward, and perished as usual. But in 1853, by a special Providence, *both* the legislative Houses entertained, considered, and actually passed—after ten failures—the enactment known as "The Charitable Trusts

Act, 1853." Surely this, then, must have been a perfect measure! Brought in by the Whig Attorney-General, taken in hand, and eventually carried through, on the change of Ministry, by the Conservative law officers, we shall find the powers given by this well-considered Act to be ample, and the remedies appropriate! Referring, however, again to the great British record of legislative failure and mistake contained in the volumes of Hansard, we see that on July 6th, 1854, less than a year after the Act had come into operation, upon a sum of 15,000*l.* being asked for in respect of the expense of the Charity Commission, an honourable member (Mr. E. Ellice) took the opportunity of observing that if the powers of the Commissioners were really so limited as they were represented to be, and the means of reforming the abuses of charitable funds, and the remodelling of schemes for their better application, were not to be extended to the Board, "it would be better at once to say to the public, It is impossible for us to interfere with the administration of the Court of Chancery, and therefore you are left in the same difficulties in which you have been placed ever since the report of the original Charity Commissioners." To which Sir George Grey courteously replies, admitting the defects complained of:—"He could bear a willing testimony to the zealous manner in which the paid Commissioners had directed themselves to the discharge of their duties; *but at the same time he must admit that the Commissioners themselves felt that their powers were quite inadequate to the discharge of the duties which were expected from them. It was, however, thought better not to apply to Parliament for any extension of their powers, until there had been a year's experience of the working of the Commission; but no doubt a measure having this object would be laid before the House next session.*" The fact, then (which was known to all who had studied the Act), that the statute of 1853 did not effect what was most desired, was openly confessed in Parliament; and it is apparent that the same ignorance and jealousies,—the same strong Interests,—the same weakness of Governments,—the same indifference or animosities of Political Parties, which had prevented legislation on this subject for

upwards of thirty years,—had operated to produce such compromises, that the statute, when at last it came to be tested, was, after all, for many important purposes, a failure. An Act of Parliament of sixty-eight sections had, it is true, been enacted; but those clauses which would have rendered them available, had been omitted. The watch had been constructed, but upon the particular condition that the mainspring should not be intruded into its machinery: it was not allowed to go, because it might go too fast.

This absurd state of things produced considerable disappointment. Although the Commission was hard at work, and doing all that lay in their power, no practical fruit was visible to the popular eye; and indeed it was true, that whenever trustees of charities were disposed to baffle or disregard the Board of Commissioners, they were generally able to do so with impunity. Hence an outcry was raised by the newspaper press; and as it is more easy for writers to abuse men, than comprehend the merits and flaws of Acts of Parliament, the Commissioners were personally attacked and slandered. "Who is Mr. Peter Erle?" asks one writer. Now any practising barrister or solicitor could have told him (if he had wanted information) that Mr. Erle was an eminent and experienced conveyancer, and about the best man the Government could have selected, as possessing special qualifications for the arduous post of Chief Commissioner. The majority of the hurried "general readers" of a "stinging" article probably would *not* be able to supply the answer to the query just put; and thus a part of the public was, we suppose, led to infer that the Government had made, in nominating Mr. Erle, an improper, if not corrupt, appointment.

Another Commissioner, the late Mr. Richard Jones, was also attacked and run down on the score of his being a *clergyman*,—a most ludicrous charge (except to the aforesaid "general reader"); for assuredly, whatever may have been the failings of that able gentleman, they did not flow from, nor were they connected with, his clerical calling. As a Tithe Commissioner, and in other public capacities, he had shown himself to be a man who united to remarkable aptitude for business, great and varied learning. Nor were the other appointments

connected with the Commission which were at first made, open to censure, so far as we know; indeed, to any person informed on the subject, it is obvious that the machinery was in fault, not the men.¹

It was then necessary to amend the "Charitable Trusts Act, 1853,"—this nerveless offspring of thirty years of parliamentary debates and Committees; and the second Annual Report of the Commissioners having clearly pointed out in what respects the Act was inoperative and defective, the requisite Amendment Bill was prepared in accordance therewith. The second reading of this Bill was moved in April, 1855, by the Lord Chancellor, who explained that the imperfections of the statute of 1853 (just two years old) had rendered the labours of the Commissioners comparatively of little avail; that though they had done all they could, yet their hands were so tied as to render it necessary, in order to make a working measure, that the proposed amendments should be passed. At the instance of Lord St. Leonard's, the Bill was referred to a Select Committee, and we next find it in difficulties in the Commons; but the second reading, after some opposition, was there permitted, upon the understanding that at a future stage it should be discussed fully. On this occasion Lord Palmerston said,—"*The real object of the Bill is to vest the Commissioners with certain powers of administration, which would prevent the necessity for long, expensive, and multiplied Chancery suits.*" Why! this had been the "*real object*" of all the "*attempts at legislation*" these thirty years, and it had yet to be accomplished! In August, 1855, a debate arose on the order for going into Committee, and the old stories again were actually heard,—Beware of "*centralization*,"—the mischief of "*irresponsible and dangerous powers*,"—"*lateness of the session*,"—"*hurried legislation*,"—and the like.

And now a new element of opposition sprung up to life—that of the Chancery barrister M.P.'s. They did not see the evil of

¹ We have heard that Mr. Jones, who clearly was disgusted with the inadequacy of the statute in question, declared that "the Legislature had only made the Board a donkey to be ridden up and down Chancery Lane, and in and out of Courts of Equity, and the public must not grumble if they were not carried quickly—and did not get where they liked, after all."

"long, expensive, and multiplied" Chancery suits in the same light as did Lord Palmerston. The Government, too, was weak, and seemed indifferent; the Equity counsel were strong and interested; and consequently the latter body triumphed (aided by the "Opposition"), and threw out or mutilated all the more important parts of the measure in committee. Our readers will be interested to see the brief summary given in the House of Lords of the havoc done in the House of Commons by the combination of the honourable members for Chancery Lane, and the right honourable members for Non-interference, and the venerable representatives for the large boroughs of Jealousy and Suspicion, and the populous cities of Vested Interests, Twaddle, and Roundabout Procedure.

The Lord Chancellor, when the husk of the Act came back to the House, simply stated that many of the most essential provisions of the Amendment Bill had been rejected by the other House of Parliament; that in its mutilated state the Bill came very short of the advantages which would have been derived from it had it passed in the shape in which it was sent down to the other House; but he thought the best thing to be done was to accept the Bill for what it was worth. Lord Campbell too "deplored" the mutilation, and lamented the loss of those powers once deemed so dangerous (when seen in Lord Lyndhurst's Bill nine years ago), but now so salutary, and which, if retained, would have rendered the Commissioners able to have determined matters judicially, without the intervention of the Court of Chancery. Amidst the concurrent testimony of all sides to the skill with which the professional men "in another place" had succeeded again in rendering the Bill abortive, the abortive Bill—the amendment statute of 1855—was passed. The Board of Charity Commissioners has again, therefore, the misfortune of being thus refused the requisites for carrying out the objects for which it was formed, and so is sentenced again to comparative inefficiency.

Lest any one should think that we misrepresent the result of the legislative labours on Charitable Trusts, we have for the most part borrowed the language of those whose confessions on the subject are conclusive. And if any corroboration of our

statement were required, we find that within a few weeks¹ one of the leading statesmen of the day—Lord John Russell himself, as one of the Commissioners—has again represented that their powers were completely inadequate, and has made a specific proposition, which, whether it be acceded to or not, shows what the present position of the Board is with regard to a large class of charities. The resolution in question is in the following terms:—"That for the purpose of extending such means (*viz.* those for national education), *it is expedient that the powers at present possessed by the Commissioners of Charitable Trusts be enlarged, and that the funds now useless, or injurious to the public, be applied to the education of the middle and poorer classes of the community.*" It is a fact which we will take for granted, that there are numerous and considerable charities which are not only not useful, but positively injurious to the recipients and the parishes where they are distributed.² And it is another fact, that the Commissioners have powers insufficient to stop this mischief, and apply the funds profitably. Not that the Charitable Trusts Acts fail in provisions relating to Schemes. They contain clauses enough, under which schemes may be framed for the class of smaller charities, *i.e.* where the income is less than thirty pounds *per annum*;³ and other clauses are directed at the class of large charities; and doubtless, whenever there has been fit opportunity for applying these provisions they have been applied; but the jealousies, real or affected, under which the statutes in question have been framed, have hindered proper powers being extended to the executive, whereby it may institute as of right those reforms which the commonwealth demands, and which the experience of the Board has shown to be requisite. If, indeed, those interested in charitable trusts—trustees or *cestui que* trusts—either on account of their desire to amend defects and abuses, or from intestine disputes,

¹ See the sixth of the Resolutions moved by Lord John Russell on March 7th, relating to National Education.

² See Speech (March 7th) of Lord John Russell, who cites as his authorities for the notorious fact, the Dean of Hereford and others. He also referred, justly enough, to the obstructive diligence of Chancery M.P.'s, who fostered all charity abuses with tenderness—a charge which, we trust, no one will be able to prefer against them again.

³ Estimated at about 25,000 in number.

or any laudable or unlaudable motive, should invoke the aid of the Board, its machinery, indirect or imperfect as it is, may be set at work. But if all parties are content with an improper, uneconomical, and irregular management of an endowment, the chances are that *that* will still be done which ought not to be done, and that left undone which ought to be done.

When Lord John Russell's resolution above referred to comes on again for discussion, and he endeavours to persuade the House that all the smaller and unbeneficial charities dispersed throughout the kingdom would be better employed in sound education; and when again the schemes of the Charity Commissioners come before Parliament, we entreat our readers to mark the speeches made; and if no effete argumentation, smacking of borough politics, and weak objections—alternately puerile and senile—are employed to deter the House from taking a sensible course in this matter, we shall have to congratulate the country on having an improved body of representatives, or on these being by accident better engaged than in meddling with and defeating the praiseworthy efforts of others.¹

While we are now writing, the "Third Report from the Charity Commissioners for England and Wales" has appeared. The bulk of the 148 pages which the Report and Appendix occupy, consists of eight schemes for the better employment of some important charities, to which we shall presently refer; but we find at the outset a statement made as to the powers which may now be exercised by the Board, which, as being the official account of the result of the legislation, should be compared with its real object, as stated by Lord Lyndhurst in 1844. It will be observed, that in almost all of the more important functions which the Commissioners state they have to perform, they have also to report to her Majesty that they are inadequately armed with authority.

¹ The debate in committee upon Lord John Russell's resolutions commenced on April 11th, and terminated virtually in their rejection; but, as we anticipated, the plan of applying charities to educational purposes, which are now confined to demoralizing the lower classes, met with the high disapproval of various members; and the Board of Charity Commissioners were assailed with charges of "confiscation," and vague warnings about "subverting all the charities of England."

The Commissioners then state (in page 3 of the Report): "We have extended¹ powers of requiring information from the trustees of charities and their agents, and the recipients of charitable funds, subject to an exemption of all persons claiming property adversely to any charity, from inquiry relating to such property.

"We are enabled to give advice and direction to the trustees of charities, who are protected from responsibility in acting upon our opinion; *but the direction has otherwise no authority, and may be repudiated by all or any of the trustees as they may think fit.*

"The right of private persons to institute legal proceedings on behalf of charities is placed under our control, and it is our duty to prescribe and regulate the publication of notices of all proposed applications to the Courts for the appointment or removal of trustees, or the establishment of schemes under the summary jurisdiction created by the Act of 1853. Our approval, also, is requisite to the validity of orders made by the County Courts or District Courts of Bankruptcy for the same purposes.

"For enforcing the due application of the funds of charities, or the recovery of their rights, or procuring for them administrative relief, we are enabled to certify to the Attorney-General cases in which we consider it desirable that legal proceedings should be instituted by him *ex officio* for such objects. *This is the only mode open to us of attaining them where no persons are disposed to undertake the necessary proceedings before the Courts upon their own responsibility, or it is inexpedient that private parties should conduct such proceedings.*

"We have very beneficial powers to authorize sale, exchanges, leases, and improvements of charity estates; and we may sanction the redemption of rents-charge, the compromise of disputed claims, and the removal of schoolmasters and other officers, *though our warrants for these purposes are not imperative on any persons.* The Act of the last session has afforded also to charities an important protection against improvident leases and alienations of their estates, by prohibiting such dispositions for

¹ Referring to certain provisions of the Amendment Act which escaped through the Commons.

terms exceeding those of ordinary occupation-leases, unless made with the authority of our Board, or under parliamentary or judicial sanction.

"The same Act contains a provision under which we may authorize the transfer of charitable funds to the official trustees by any trustees or other persons holding such funds, *and willing to adopt that course.*

"We may apportion any charities of a parish divided into districts between such districts, *if the annual incomes of such charities do not exceed 30l.*

"We are empowered to *propose for the sanction of the Legislature schemes* for the improved application of charities, where the same objects are beyond the jurisdiction of the Courts.

"Finally, we receive the annual statements of account directed to be made by all trustees of charities, *though we have no direct means of enforcing their delivery.*"

After stating what the Board has done (or endeavoured to do) upon nearly nine hundred applications, the Report proceeds to state that the Commissioners are "without the means of instituting any systematic or comprehensive inspection of charities;" but that, *nevertheless*, they have been enabled to discover and register 3,000 charities which either had escaped the inquiries of the former Commissions, or had been founded subsequently to them. A little later we read (Report, p. 5): "Further experience has confirmed us in our estimate of the very beneficial effect of an authority to direct and indemnify trustees by our advice in cases of doubt or difficulty; *but we have reason to think that its benefit would be greater if the law had given to our direction* (at least when adopted by a majority of the trustees) a binding effect until reversed or varied by a competent Court."

The Commissioners then, we see, state again, as they have stated before in almost every paragraph of their third Report, that their utility is still limited, and, as we infer, that the parliamentary fetters forged for them—by the persons and in the way we have already described—have answered remarkably well for all the purposes of rendering their labour and its results out of all proportion. During the year 1855, eight hundred and fifty-four special applications were made to the Board. The

circumstances of these charities were considered, and no doubt on numerous occasions trustees have received very useful advice and directions; but it is palpable that even here their efforts are crippled, and their labours may be made nugatory at the will and pleasure of recusant trustees.

And now it behoves us to say a few words as to the principles upon which new schemes for the employment of charity property may be framed.

There are eight schemes proposed by the Board under the 54th and six following sections of the Charitable Trusts Act, 1853, which enacts that when it shall appear to the Board desirable to have a new scheme for the management of a charity, which cannot be carried out otherwise than by the authority of Parliament, such scheme may be proposed by the Board, and having been "provisionally approved," "published," "altered," "modified," "referred to," and "reported on" by inspectors, ~~as~~ provisionally "approved" and "certified," shall be laid before both Houses of Parliament, together with the objections which have been made against the scheme, as well as the grounds of the Board's approbation thereof. These eight schemes, which will have to encounter the wisdom of the Lords and Commons, relate to some large and important charities, including Sherburn Hospital (Durham), Moulton Endowed School, the Spalding Charities, Dulwich College, and the Coventry and Nottingham Charities.

The decision of the Legislature, say the Commissioners, referring more particularly to the Coventry Charities scheme, "may enable us the more confidently to select our course of duty in other cases." The scheme in question cuts off mischievous distribution of large funds, and proposes their rational application; wherefore, there is out of doors, amongst the dispensers and recipients of the large funds, much holy horror for the impious Board which dares profane the sacred wills of founders dead and gone. Probably the discontent in Coventry will find some eloquent echo at St. Stephen's;¹ but we will not prophesy whether the Commissioners will find real support

¹ Strong indications of this have been already shown incidentally in a speech by Mr. Ellice, the member for Coventry, on April 11.

from the Government or independent members, or whether, if any united opposition be threatened and formed, the Houses will decree—consistently with all the other antecedents in charity legislation—that endowments shall be held sacred for all the purposes of mischief and mismanagement, but that they must be preserved against the sacrilege of rational adjustment, or useful application.

What are the principles upon which charitable endowments should be applied? The general answer we should offer is this,—1. When the founder's intentions are at the present day found to be rational, useful, and wise, let them be enforced diligently, intelligently, and in the spirit in which they were conceived. 2. If his intentions, on the other hand, are either in themselves, or have become from lapse of time or change of circumstances, irrational, useless, or mischievous, let the funds bequeathed be applied for the benefit of society, after such a mode as its members (or those commissioned by them to decide on such questions) shall decree. Frequently a simple adjustment of the funds is only required, and they can often be well administered on the *cypres* doctrine; but whenever it is obviously more beneficial to make a radical change in the object of a trust, it is as obviously the right and the duty of society to effect the best they can devise. This latter doctrine was boldly asserted in the Bill which the Commons cut up. It was proposed to enact, that it should be lawful for the Board to frame and approve of schemes for the application of any charitable funds to the promotion of charitable purposes different from the terms of the trust in the several following cases; viz., "where it appears to the said Board that the charitable purpose for which any fund has been given by the founder has failed; and where the said Board are satisfied that the fund, as administered according to the charitable trust affecting the same, creates or increases pauperism or immorality; where, in the opinion of the said Board, the fund of any charity administered separately is insufficient for the purposes for which it was given by the founder, but may, under a scheme approved as aforesaid, be effectively employed in union with, or in aid of, any other charity, whether supported by endowment or by

voluntary subscriptions, or partly by endowment and partly by voluntary subscriptions, or in extending the benefits of any such other charity;—where in the case of any charity founded more than sixty years before the approval of the scheme in relation thereto, the said Board are satisfied that the charity has no beneficial results, or that the benefits are insignificant, having regard to the income thereof, and that the income of such charity may, under a scheme so approved as aforesaid, be beneficially applied to other charitable purposes in the district or districts where it is administered.”

A strict watch ought to be set upon the natural effects of time upon the wants of society, as well as against the constant parasites of endowments—corruption and robbery. The well-known recital in the great statute of Elizabeth¹ states in unequivocal terms that the endowments of charities at that time were in an insecure condition, and were not “*employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver, and employ the same* ;” and the first Charity Commissions were then set on foot. There was, however, no shrinking in Elizabeth’s reign from meeting the evils, which were notorious, in an efficient and prompt manner. The commissioner then had ample powers, and freely used them.² All subsequent experience, indeed, demonstrates that, useful or mischievous, charitable trusts are peculiarly liable to abuse and loss; and no one, therefore, openly denies the advantage of having an efficient Board to control them. But we do find, whenever we come to the altering, modifying, or reconstituting a mischievous, useless, or absurd foundation, that the tongues of the foolish are loosed, and the words of the superstitious spring up as grass, and the mistake or folly of a man is rendered to certain minds sacred by his death; nay, some even refuse to believe that a testator or living founder could have been wise enough to have adapted to the change of circumstances his bequest, if the control over it could have been continued to him after he had left the world.

¹ 43 Eliz. c. 4, “An Act to redress the Mis-employment of Lands, Goods, and Stocks of Money heretofore given to Charitable Uses.”

² See Duke’s Law of Charitable Uses.

We should, however, submit, that the greatest compliment one could pay the memory of the departed benevolent, is to believe that they were always minded to do the best for humanity with that property, for which they had no longer any use themselves, and which, moreover, society had permitted them (as a matter of convenience, not of right) to bequeath, subject to certain rules, express or implied. Surely we may give our predecessors credit for the *best* intentions, and we should employ the property—public or private—which once they enjoyed, and had to pass on in the course of nature, according to the most urgent necessities of the present dwellers upon the earth, and in the most profitable and benevolent manner. Whatever conventional rules of law we may make for the sake of convenience as to the schemes to be adopted with respect to the foundations of the worthy dead, the *right*, we apprehend, exists in the living society to order its application in a way, either foreign to, or analogous with, the wishes of the founders, “as then advised.” Nevertheless, we foresee that many will they be who will stand up, in and out of the House, and appeal to the prejudices of mankind in favour of “doles,” and all sorts of pauperizing payments (especially if they occur in a borough represented by a member who knows the value of such eleemosynary practices). These appeals will be made, perhaps, not so much because of an ancient belief that such charities are not so mischievous as political economists now declare them to be, but on the ground that we should never violate pious duty towards a deceased benefactor, by departing from his expressed desires. They, however, who hold such a view as this should remember that the Court of Chancery and Parliament have the right to “violate,” expensively and wastefully, the wills of the deceased, who certainly never contemplated that their funds should go in large costs to solicitors, or fat fees to Chancery counsel.

If the true principles upon which charity funds should be administered are understood and conceded, there only remains the duty of confiding to proper and lawful hands ample means of consistently carrying out these principles in every parish and district. It requires a Man or a Government with both a heart and a will to complete the work, by giving to the Charity Com-

mission the position and powers which we have shown are positively requisite. Will the law as to charities be left as it now is? Will the Charitable Trusts Acts remain among the numerous statutes which afford us examples of certain legislative characteristics of the day, which we take chiefly to be these;—the talking upon *all* subjects, the touching of *many*, and the thorough treatment of *none*;—so that if a principle be truly affirmed, it is cowardly compromised forthwith; and if Truth is embraced eagerly, it is only that she should be afterwards abandoned at discretion?

There yet remains, however, to us one veteran Law Reformer—the Lord Brougham who struck the first heavy blow at charity abuses. Will he give them their *coup de grace* now? He has supported the feeble, wandering steps of governing bodies, as they have for these thirty years been alternately doing a little and being done a great deal. He has seen admitted all that he affirmed a quarter of a century ago; and the errors now found in the practical mismanagement of the Legislature do not lie at his door. To Lord Brougham, then, we may now once more look to make a perfect system out of the faulty measures which we have been discussing. No one knows better than he in what they are defective, and no one could declare it more powerfully. He carried the stronghold of the enemy long ago, but left a feeble garrison in it to repel the little attacks of the beaten foe. This they have done very unsuccessfully, and chiefly by small bribery, a bit of a principle surrendered here, and a practical provision yielded there. The statutes require comparatively but a little verbal amendment to make them of immense value. The difficulties to be encountered we know; they consist of the confederacy interested in continuing abuses, the general debility of the Government, and the constitutional mechanism by which every facility is offered of spoiling or defeating a good Bill in its progress to maturity, and foisting on the public statutory shams and absurdities.

ART. VII.—MEMOIRS OF MRS. FITZHERBERT, WITH
AN ACCOUNT OF HER MARRIAGE WITH H.R.H.
THE PRINCE OF WALES, AFTERWARDS KING
GEORGE THE FOURTH.

By the Hon. Charles Langdale. 8vo. pp. 202. Bentley, London, 1856.

THE experience of late years has proved that the prayer to be saved from one's friends should by no means be confined to the living, but may even more properly be supposed to issue from the tomb. The decease of every remarkable person, and of many who were but little celebrated during their day, has, for some time past, become the occasion of publishing whatever anecdotes could be collected by the dealers in gossip, and of all the letters that could be obtained, however manifest it might be that the stories were unfit to be recorded, or the compositions to see the light; and in most cases the memory of the departed individual has suffered, whether the proceeding originated in the desire to gratify public curiosity, or in the mistaken design of raising him in public estimation; insomuch that Death has been sometimes said to be now armed with a new terror. We must at once admit that the very respectable and well-meaning author of the work before us, falls not within the scope of these remarks, except so far as regards the injury he has done those he meant to serve. He has been actuated only by his affection towards his deceased relative, and by his zeal for the religious opinions which, in common with her, he professes. But it must be further allowed, that his advocacy both of the individual and of her religion is singularly unfortunate; for with the purest intentions possible, his book, in the opinion of all considerate and impartial readers, must appear not a little prejudicial to both. But it is only in one respect that the work comes within our province—the matter of law which it contains; and no doubt this is of more than ordinary importance.

Mr. Langdale appears by several parts of the book to be

Mrs. Fitzherbert's nephew ; for he represents his brother, Lord Stourton, to be related to her by blood, and he mentions Mr. Bodenham as his brother-in-law ; and in another place tells us that this gentleman's wife was Mrs. Fitzherbert's niece. Nothing can be more absurd than leaving us to gather this relationship by such conjectures, when he might have stated it simply and distinctly. Mr. Langdale further conceives that the honour of the Roman Catholic religion is as much concerned as that of his aunt in the refutation of a statement quoted over and again from Lord Holland's Diary, that a person of veracity had assured him of the marriage with the Prince having been the wish of the latter, and not of the lady, who all along was aware of its invalidity, and was willing to give herself up to the wishes of the Prince without any such empty ceremony. On the contrary, says Mr. Langdale, she would on no account submit to such a thing without a marriage, which, however invalid by the law of the land, that is, however illegal, however void in itself, and attended with high penalties, was in the eyes of a good Catholic binding, and therefore lawful.

The facts are, as stated by our author, shortly these :—She was addressed by the Prince, who proposed marriage, and she resisted his importunities, being aware—although both Lord Stourton in his narrative, and Mr. Langdale in his rambling and confused book, seem to avoid distinctly stating it—that the marriage was illegal, as being without the King's consent, and that it must be attended with a forfeiture of the Crown. When Lord Stourton describes the marriage as being felt by her to be attended with "great sacrifices and difficulties ;" and again, that she knew it would "plunge her in great and inextricable difficulties," while he describes her as aware "that it would give her no legal claim to be the Prince's wife," we must at once perceive that she acted all along with her eyes open to the nature of the contract, and of the connection she was asked to form. Her resistance was overcome by a proceeding which most readers will consider as a stratagem. An eminent surgeon, accompanied by three personal friends of the Prince, "arrived at her house in the utmost consternation, informing her that the

Prince had stabbed himself, and his life was in imminent danger." The narrative adds that they also said, "only her immediate presence could save him." However, any person of ordinary acuteness must have perceived the utter inconsistency of this story, and therefore its manifest falsehood; for if the eminent surgeon pronounced his patient's life to be in imminent danger, how could her presence save it? That Lord Stourton's acuteness did not suffice to make him perceive this, is manifest; and we suppress intentionally the names of the four persons whom he accuses of telling the impossible story, because we do not believe that they ever told it. They could only have said that he would kill himself; that he had given himself a wound which he would repeat. They never could even have said that he would let himself bleed to death, unless she went to see him (the only conceivable way of her saving his life), because the surgeon would by that statement admit that he had left his patient in extremities. She manifestly had too much sense to believe any such story; "she resisted in the most peremptory manner all their importunities, saying that nothing should induce her to enter Carlton House" (p. 118). However, "she was afterwards brought to share in the alarm; but, still fearful of some stratagem derogatory to her reputation," she refused to go unless accompanied by some lady of high character; and the Duchess of Devonshire was selected. His Royal Highness must by this story have been bleeding for a considerable time; but they arrived, having called at Devonshire House to take up the duchess. Mrs. Fitzherbert found the Prince pale and covered with blood, "which so overpowered her that she was deprived almost of all consciousness," though the noble historian does not take it upon him to assert that she fainted. The Prince then proceeded to say that "nothing would induce him to live unless she promised to become his wife, and permitted him to put a ring round her finger." His lordship adds his belief that a ring of the duchess was used on this occasion, and not one of his Royal Highness's. He says further, that he asked Mrs. Fitzherbert (a very natural question) whether she did not believe some trick had been practised, and that it was not the Prince's blood which she saw; but she

answered in the negative. Two proofs of her being right are then stated to have been given by her, one pertinent enough, the other wholly beside the subject : it seems she had frequently seen the scar afterwards, and also saw some brandy and water near the bedside on the day in question. A deposition was then drawn up at Devonshire House of what had occurred ; "it was signed and sealed by all the party," we presume with the exception of the wounded personage, who "went into the country for a change of air," while Mrs. Fitzherbert went abroad, after writing to one of the party a letter, "protesting against what had taken place, as not being a free agent." She remained on the continent some years, and refused to perform the promise extorted by what she termed force ; but a correspondence was carried on between the parties, through that respected person the Duke of Orleans (*Egalité*), and she was induced to "promise formally and deliberately she never would marry any other person." The *naïveté* of what follows is remarkable. After so much had been said of "resistance with the utmost anxiety and firmness ;" of "resisting all importunities in the most peremptory manner ;" of "protest that she was not a free agent ;" of her wish "to break through her own engagements ;" of "her breaking off a union fraught with such dangerous consequences to her peace and happiness ;" the noble historian gives as the reason for the promise never to marry another, that she was under the influence of fear from the fact of what his Royal Highness might do under "his desperation ;" adding, "lastly, she was induced to return to England, and to agree to become his wife on those conditions which satisfied her own conscience, though she could have no legal claim to be the wife of the Prince" (p. 121).

Now what were these conditions? All that Lord Stourton states is a marriage by a Protestant clergyman in the presence of her uncle and her brother, a marriage, he is pleased to say, according to the rites of the Catholic Church. But it could only be according to those rites, by being a valid marriage according to the laws of England, where it was contracted. There runs through the whole book a kind of doctrine, half brought out, that a marriage may be good in the eye of the

Romish Church, which is illegal in every other sense. Now we can imagine a Roman Catholic maintaining that if the contract is solemnized by a priest according to certain forms peculiar to their church, it is binding on their conscience, though void in law. But how a marriage, which only pretends to be a Protestant marriage, can be binding on the conscience, if it has no force or effect whatever by the law of the Protestant state to which the parties belong, and in which the solemnity takes place, appears utterly incomprehensible. Among the inconsistent things stated by Mr. Langdale, we repeatedly find it assumed that the Roman Church holds the ceremony to be binding on the conscience, because it is according to the course pursued in the country; at least his statements resolve themselves into this. But then, if it has no legal force, and especially if it only binds the conscience of one of the parties, how can it bind the conscience of the other? It surely cannot be meant to contend that the mere consent of parties before witnesses makes a marriage binding in the Catholic Church, without any regard to the capacity of the parties to contract it;—and how is that capacity to be ascertained except by the law? Now what law is to determine it? Mr. Langdale must, to have even the shadow of consistency, maintain that the law of the Romish Church is to determine. But then he says that law only requires a consent before witnesses. Will he maintain that the presence of a priest is unnecessary? That he never can do since the Council of Trent. But must it not be a Catholic priest? He dares not say that, because Mrs. Fitzherbert was married by a Protestant clergyman. But at the date of the marriage this was required by the law of England, and without a clergyman the marriage was void. Then it was only a marriage binding by the law of the Catholic Church, in so far as it was a marriage good by the law of England; and by that law the consent of the King was just as necessary as the presence of a clergyman.

Mr. Langdale is clearly misled by the undeniable fact that marriage is in the eye of the Romish Church a sacrament; and hence those who are married regard the dissolution of the contract as impossible, unless by Papal authority; and regard a

divorce by Act of Parliament as having no power to release them from the obligations which they have contracted. But it is a sacrament only because it is a marriage; and it is a marriage only because the law of the country makes it such. Would Mr. Langdale regard the vows of parties as constituting a marriage and a sacrament, if either were married at the time to another? Certainly not; and why? Because such a ceremony would be a form void of all legal substance.

But there prevails an error of the most gross description through the whole of Mr. Langdale's statements, as well as of Lord Stourton's; and it is fatal to their argument in favour of their kinswoman, or, if they please, of their Church, which they are pleased to regard as committed by her conduct and opinions. Suppose all they contend for to be true as regards the obligations of the marriage; suppose that Mrs. Fitzherbert, having contracted a marriage void by the English law, was still by the law of the Church bound to regard it as obligatory on her, as binding her conscience, it surely could confer no rights whatever. They admit that it gave no rights of a temporal kind. But could it give any of a spiritual kind? Because she was bound, and the Prince free, did it follow that she had a right to act as if both were bound? But suppose the Prince was a Roman Catholic, and bound as well as herself, surely no one can contend that this common obligation superseded the law of the land, and converted concubinage into marriage. Observe, too, that the converse of the proposition must be equally admitted, if we admit that the marriage because binding by the Romish religion gives the religious rights. A marriage between first cousins requires to its validity by that religion a Papal dispensation. Will it be contended that such a marriage without dispensation has no obligatory force on the conscience if ever so valid by law, and ever so solemnly contracted? Then a dispensation is sufficient to make any marriage between blood relations valid by the law of the Church. Will it be contended that a marriage between brother and sister, or father and daughter, having a dispensation, is binding on the conscience of the parties? There is no end of the absurd consequences to which the notions of these parties tend. But we

have yet to mention a statement still more extravagant. After the Prince had legally married the Princess Caroline of Brunswick, he was desirous of renewing his intercourse with Mrs. Fitzherbert, whom her kinsmen regard as his only lawful wife. She, after divers objections, consented, but only provided she obtained the Papal sanction. Nay, they go a step further, and contend that she felt herself bound, by the obligations of her marriage, to suffer a renewal of the intercourse,—in a word, to cohabit with the Prince,—to live in what the Romish law would term a state of bigamy with him, because he had contracted a marriage which that law regarded as bigamy, at least in the Prince. Therefore the application is made to the Pope; and though a most mysterious silence is preserved as to the precise terms both of the application and the response, it is stated in very precise terms that the cohabitation was renewed, because the answer from Rome enjoined it as a consequence of the marriage,—illegal in England, and binding in the eye of Rome. We are informed that “members of the Royal Family, both male and female,” urged it upon a principle of duty; that the marriage with Princess Caroline placed Mrs. Fitzherbert in a situation of much difficulty, involving her “own conscience;” that “public scandal might interfere with her engagements” (*i. e.* her marriage vows); that she resorted to “the highest authorities of her own Church upon a case of such extraordinary intricacy.” Therefore Lord Stourton considers it a case of “extraordinary intricacy,” “of much difficulty,”—whether a woman, not legally married to a man, and having lived with him when he was single, ought to cohabit with him after he is legally married to another woman still living, and still his lawful wife. To solve this great difficulty, an English priest is sent to Rome, “to lay the case before that tribunal.” Why do not the kinsmen of Mrs. Fitzherbert say plainly what tribunal? Was it the Pope, or one of his courts? The implication no doubt is, the Pope. But why not fairly and honestly say so? Then comes the result, also wrapt up in vague phrases, but plainly indicating that the Pope had been applied to. “The reply from Rome, in a brief, was favourable to the wishes of the Prince;” and the cohabitation immediately was renewed. We should

have liked to see the brief; but "in a moment of panic she destroyed it, fearful of the consequences during Mr. Percival's administration." Lord Stourton's narrative speaks in direct terms only of permission by the brief; but it is plain that he means it to be inferred, that cohabitation was directed. Mr. Langdale, in express terms, states that "it may have been said to have been enjoined" (p. 149). Now, the work of this gentleman is announced as undertaken from the duty of defending the author's religion, together with the character of his relative; because, if she acted immorally in respect of a marriage authorised by her Church, the reputation of her religion suffered through her. We put it to any person of ordinary understanding, not being Mrs. Fitzherbert's kinsman and a Roman Catholic, whether, in the first place, the Catholic religion must be supposed to suffer each time that a female Romanist goes astray, or errs in point of doctrine (for we are left wholly in the dark upon which supposition the zealous author proceeds); but, secondly, whether it is possible to imagine a heavier charge against the Catholic Church than its directing—but say only its formally and by a written instrument sanctioning—a woman to cohabit with a married man whose mistress she had been, under the illegally-assumed name of wife, before he had contracted a lawful marriage with another, still his lawful wife. It is vain, and it is ridiculous, to disguise the truth under general phrases and sentimental circumlocutions. The laws of this country apply to such a connection the word concubinage at the one period, and adultery at the other. A good deal of this was known in society at the time; and more was generally suspected. We are not aware that, until Mr. Langdale published his book in discharge of his duty towards the memory of his kinswoman and the reputation of his Church, the fact of the cohabitation was ever stated publicly upon unquestionable authority. We are quite certain that the injunction of the Pope, or even his license, never was either stated, or known, or suspected.

But another disclosure is due to the zeal, domestic and religious, of this gentleman; we owe to him the first authoritative statement of the marriage itself. This marriage was very universally supposed to have been solemnized; but the

particulars were never stated upon any authority; and although evidence of it was generally believed to be in existence, very few were aware in what the proof consisted. We have now a distinct account of it, apparently upon sufficient authority; and every one must admit that there are the means of making that evidence forthcoming. We do not say that Mr. Langdale proves the marriage, but he gives the particulars of the proof, and tells us where it may be had.

It seems that soon after the death of George IV., his executors, the Duke of Wellington and Sir W. Knighton, and Mrs. Fitzherbert, formally agreed to destroy all letters and papers signed or written by either party, with the exception of five, which Mrs. Fitzherbert required to be set apart. These were, a mortgage on the palace at Brighton, a will of George IV., a letter from him relating to his marriage with her, the certificate of that marriage, signed by the clergyman who performed the ceremony, and a memorandum of Mrs. Fitzherbert attached to a letter of the clergyman. To the certificate the names of her uncle H. Errington, and her brother J. Smythe, had originally been signed as witnesses of the marriage; but she had cut those names off at their urgent request, in order to save them from the penalties of a præmunire which they had incurred. The great indistinctness which prevails through the writings both of Lord Stourton and Mr. Langdale leaves doubts on the reader's mind as to some particulars. Thus, the list of the papers given in p. 87, signed by Lord Stourton, does not mention the certificate as in the Prince's handwriting; but in p. 122 his narrative so describes it. The narrative also describes a letter written by the Prince as still extant, in which "he thanks God that the witnesses are still living;" and describes another paper, signed and sealed by him, in which he calls her his wife; but no such paper is mentioned in the list. We are therefore left in some uncertainty as to the precise nature of the documents; and can only feel assured that they contain what, if produced, would amount to proof of the secret marriage contracted in 1785. They were all sealed up, moreover, under the seals of the Duke and Sir W. Knighton, Lord Albemarle and Lord Stourton, and lodged with Messrs. Coutts; the seals not to be broken without the knowledge,

which must be understood to imply the permission, of the Duke and Sir William. Lord Stourton denies that their consent was to be necessary before the papers could be inspected; but he denies it faintly (pp. 88, 89). It would further appear from a letter of Lord Albemarle, that the deposit was made by him at the banker's; and that only his own seal and the Duke's were affixed to the parcel. But the deposit was accompanied with a memorandum signed by Lord Stourton, as well as the Duke and Lord Albemarle, and dated 24th October, 1833, that the papers were placed by Mrs. Fitzherbert at the disposal of Lord Albemarle and Lord Stourton, who transferred, as far as he had any right to do so, his control over the papers to Mr. Langdale. But Mr. Langdale justly admits the entire invalidity of this transfer, and Messrs. Coutts regard the control to be in Lord Albemarle alone (p. 54); and the property in the papers may possibly be considered as vested in him and his executor.

But a question might arise between that executor and the representatives of the Duke as George IV.'s surviving executor, or between those parties and the Crown; and supposing that question disposed of, there is a manifest difficulty in the case from the Duke's knowledge, probably his consent, being required to the opening of the parcel by the original agreement between the executors of George IV. and Mrs. Fitzherbert herself. The parties were all so much aware of this circumstance, that when Lord Stourton desired to see the papers after Mrs. Fitzherbert's death in 1837, Lord Albemarle applied to the Duke; and renewed the application afterwards. Some correspondence ensued, and a personal interview took place with the Duke. The result was his very peremptorily refusing his consent, and "protesting most solemnly against opening the packet deposited under the several seals of Lord Albemarle, Lord Stourton, and himself" (p. 104). This was in August, 1841. The Duke intimated that he probably might require the consent of the Sovereign before he allowed the opening of the packet. A letter by Lord Stourton seems to show that he had applied to his Grace to obtain that consent, for, in answer, the Duke says (April, 1842) that he has no office of a political nature, and can only give advice when required. His own refusal is put upon public grounds, as well as on his

belief that Mrs. Fitzherbert herself would have been most averse to any step being taken which could revive discussion regarding the secret marriage. After the Duke's death, Mr. Langdale applied in 1854 to Lord Albemarle's executor, Mr. E. Keppel, for access to the papers, in order to refute what he considers as the calumny of Lord Holland's Diary. After much correspondence, Mr. Keppel, by the advice of the Duke of Bedford, whom he consulted, and with the concurrence of Sir G. Seymour and Mr. Foster, Mrs. Fitzherbert's executors, refuses the access desired, and assigns as his reason that those papers could throw no light upon the question between Mr. Langdale and Lord Holland's Diary, as they only give evidence of the marriage, which Lord Holland's statement does not dispute. There may be considerable doubt how far this negative could be ascertained without an inspection of the documents. But our present business is with the marriage and its proofs; and we hold it to be quite clear that the Duke of Wellington exercised a sound discretion in refusing his assent to the disclosure of papers which there is every reason to believe would place the existence of the marriage beyond all doubt. At present there may be sufficient proof to satisfy most men's minds that such evidence exists; but there is a great difference between that and the actual production of the evidence.

Now suppose it produced, and that no possibility any longer existed of denying, or of doubting the fact—George IV. had forfeited his right to the Crown, and was no more entitled to exercise the functions of royalty than if he were naturally dead. This is the provision of the Act, one of the most important in the whole Statute Book, and one by virtue of which the Crown is in the reigning family. An absurd and most inconsiderate attempt has sometimes been made to evade this exigency, and show that there was no forfeiture, by stating that the marriage with a Catholic was illegal and void under the Royal Family Marriage Act of 1772. But to this the answer is obvious, that the forfeiture was denounced in order to prevent all attempts, as well as all completed acts of disobedience; and that whoever holds the nullity of the marriage sufficient to save the forfeiture, must be prepared to hold polygamy no offence, since

the second marriage before the first is dissolved, has no more validity than the marriage of the Prince without the Sovereign's consent. Indeed, the law of all countries abounds in examples of acts absolutely void causing a forfeiture. Our English law makes the fruitless attempts of a tenant for life to enlarge his estate, a forfeiture of that estate, as if he were naturally dead; the next in succession takes it, although the act done is not of more value than the paper or parchment on which it is written. So in Scotland the act done in contravention of the prohibitions of an entail is an absolute nullity, and yet the doing it lets in the next in succession. But we need go no further than this in the argument; the solemn provisions of the Bill of Rights and Act of Settlement must be assumed as repealed without any reference to them by the Act of 1772, before we can admit that the invalidity of a marriage contracted against the prohibitions of that Act, will prevent the forfeiture.

When we moot this question, notwithstanding its delicacy, and against what appears to have been the wishes of the illustrious Duke appealed to, as well of the present Duke of Bedford, we must remind the reader that the discussion has been forced upon us by somewhat higher authority than the author of the work now before us, and of his deceased brother,—an authority which the last-named Duke will not be disposed to disregard. Lord John Russell thought proper to publish in Mr. T. Moore's *Diary* a private conversation at which that individual was present, and of which, according to his practice, he made a note on going home.¹ The persons who joined in the discussion of the legal question at present under consideration, were the Queen's Counsel, her Attorney and Solicitor General, Mr. Williams (afterwards the Judge), and Mr. C. Butler, the most eminent conveyancer of his time, and a zealous Catholic; whose prejudices, therefore, must have been against the forfeiture, could he as a lawyer have entertained any doubt upon the subject. The report in the *Diary* states the opinion of all these

¹ In his *Memoir of Mr. Fox* he states the fact of the marriage broadly enough; but in his publication of *T. Moore's Diary*, he further gives the opinion of learned lawyers upon its penal consequences. This goes much further than the documents which his brother decided that Lord Albemarle should refuse to make public.

learned gentlemen as clear that the invalidity of the marriage could not prevent the forfeiture, and upon the grounds which we have here stated. But when the Diary adds that the point was not taken by those advocates of the Queen in 1820, because there was no evidence of the marriage, there must be a gross misrepresentation of what passed; for it is well known that not only Mrs. Fitzherbert but Mr. H. Errington, who witnessed the marriage, was still alive, and that the intimations thrown out by the Counsel of the resistance to the Bill of Pains and Penalties possibly throwing the country into confusion, never could refer to recrimination. No doubt, had Mr. Errington been called, he, as well as Mrs. Fitzherbert, might have refused to answer a question which would expose them to severe penalties; but it is at least equally clear that their refusal would have sufficed to put the fact of the marriage beyond all moral doubt, while Mrs. Fitzherbert never would have denied that she had at all times been a Roman Catholic, even if a strained application of the rule as to self-crimination had protected her from answering that question. The case of a disputed succession, with all its dreadful consequences, would therefore have arisen, supposing that no documentary evidence of the marriage had been forthcoming; and that is by no means certain.

It must be further observed, that the provision respecting forfeiture is, considering the importance of the subject, and the unquestionable honesty of the intentions with which the great men of the Revolution of 1688 penned it, singularly ill—one should say carelessly and inartificially—conceived, because it is left without any mode pointed out for carrying it into execution. How the fact of the marriage is to be ascertained, or how the Catholicity of the party, is left wholly unmentioned. How, if ascertained, the cause of the forfeiture is to be declared, and the forfeiture itself to be promulgated, is equally left in the dark. The subjects are absolved from their allegiance, but no means are afforded them of knowing whether that duty has ceased or not;—nay, at what time it has ceased;—indeed, at what time the wrongdoer has ceased to be Sovereign, whether at the time of committing his offence, or at the time of its

being discovered, or at the time of its being declared (probably by the two Houses of Parliament, on the supposition of the doctrine being sound which one party held a century after on the question of a regency), is not in any way stated, nor is anything stated from whence an inference can in any manner of way be drawn. And yet all these gross and most glaring defects notwithstanding, it is quite certain that the statutory provision is in full force, and is regarded as one of the main bulwarks of our constitution against the dangers of a Catholic reign.

Let us now consider what would have been the effect of bringing forward the subject in the proceedings of 1820. We say nothing of the consequences which would have resulted from legal proof being given of the marriage, because we consider it manifest that this must have occasioned a declaration of forfeiture. But supposing, what is more probable, that no such proof had been tendered, in consequence of the witnesses called refusing to answer the question, it seems most likely that an Act would have been passed to declare, or rather to enact, somewhat violently, that, the marriage being void, no forfeiture had been incurred; and further to remove all doubts of the title of the Prince as Regent and as King in the preceding years. Indeed, this would seem to be as necessary a proceeding as the Act passed in 1688 to remove all doubts as to the sitting of the Parliament; for he was no whit more a king in 1820 than they were a Parliament in 1688. It does not appear necessary to pass such an Act now, even if the documents proving the marriage were produced; nevertheless some doubts might be raised upon this; and it is to be remembered that among other important acts made during his reign, one was the abrogation of the Penal Laws. What a strange notion of duty towards their religion (may we observe in passing) the Romanist authors of the work before us must have, when they take such pains to prove the forfeiture of his Crown by the Sovereign whose most distinguished legislative act was the removal of the disabilities under which for a century and a half their Church had suffered!

We have passed over many things in this book which give rise to remarks little laudatory of its author. Thus there

is more than insinuation against Mr. Fox that he had volunteered a denial of the marriage in the House of Commons, without due authority from the Prince. Whoever reads his letter ten days before the marriage, and the Prince's answer, containing the most gross falsehood, and also reads the shuffling denial which he afterwards gave to Mrs. Fitzherbert and Lord Grey, of having authorized Mr. Fox, will at once acquit Mr. Fox of this charge, although we cannot avoid feeling that he did wrong both by Mrs. Fitzherbert and by himself, in not retracting the denial as soon as he discovered that he had been deceived, and been made the channel through which a falsehood was solemnly asserted to the Parliament and the country. He was at all events bound to make it known in more distinct terms than those used by him ("he had direct authority"), that the Prince's own denial was what he intended to convey.

Another thing which we may note respecting this book, is the extraordinary notion entertained by Lord Stourton that he does his kinswoman honour by relating her advice to the Regent in 1811. She strongly urged him "not to sever himself from his former political friends." But she said he might, after "retaining them in power for six weeks, find some pretext to dismiss them; only she advised him not to break with them without some pretext or other." This advice of a woman always esteemed honourable and even high-minded, may serve to show at once how dangerous is the contact of a court, and how much princes are to be pitied for the atmosphere of intrigue which they seem doomed always to breathe.

The canvassing of Peers by the Prince on the judicial question of Miss Seymour's guardians, would give rise to a third observation, but for the inaccuracy as to dates, and indeed other matters of fact which pervade this volume, and make it extremely difficult to be assured that the letter in p. 154 to the Duke of Norfolk, related, as Mr. Howard of Corby (representative of his Grace's executor) assumes, to the appeal from Lord Eldon's order; and there is great doubt cast on the whole statement by the comparison of dates.

ART. VIII.—PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

I. REPORT OF THE SPECIAL COMMITTEE ON THE PARTNERSHIP BILL.

Report of the Special Committee appointed at the Special General Meeting held on the 18th February, 1856, to consider and report on the Partnership Bill. Read at the General Meeting on the 25th February, and then received and adopted.

THE Partnership Amendment Bill consists, in effect, of the following clause only, viz., "The advance of capital or money to be used in any trade or undertaking, not being the trade of a banker, upon a contract with the person carrying on such trade or undertaking that the person making such advance shall receive a share of the profits [or shall bear a share of the loss] of the trade or undertaking, shall not of itself render the person making such advance [liable to third parties as] a partner in such trade or undertaking."¹

The Law Amendment Society claim for themselves the merit of having first pointed out in their Reports and Resolutions of last year (by way of opposition to the intricate measure then contemplated) that such a clause as this was nearly, though not altogether sufficient, to establish a system of partnership on limited liability. On further consideration of the subject, they are convinced that somewhat more is required. The following are their reasons :—

Ordinarily, where limited partnerships are formed, it is not intended to create the relation of debtor and creditor between the parties. The advancer would generally be willing to advance to the concern, and not to the ostensible party. "Profit" is, shortly speaking, what remains after the debts are paid and capital replaced. To *agree* to lend for a profit return is, in effect, to *agree* to let the general trade debts be first paid.

Parties who advance money to a concern for a share of the profits are *now* partners to all intents and purposes. They are

¹ The words between brackets at present form part of the clause.

not only personally liable to the debts, but are also entitled to all equitable remedies as between partners; *e. g.*, to interfere with the books and accounts, and to have a *legal co-possession* of the property. Actions to recover outstanding debts must be now brought in their names, or a plea in abatement will lie. If they survive the ostensible partner, the legal rights to the property now survive to them, and do not go to the legal personal representative of the ostensible partner.

How far is it the object of the section of this Bill to disturb any other of these relations except the one of personal liability to creditors? Whatever the object, it is pretty clear that if the clause remains as it is, with the parts between brackets unexpunged, it will leave them undisturbed. But it is apprehended, that in taking away the legal liability to pay the debts, the legal ownership of the assets must, in justice both to the creditors and to the ostensible partner, be taken away also; and that the limited partner must be made into a mere equitable *cestui que* trust claimant on the funds. Again, under the Bill (with or without the words in brackets), could the advancer prove in bankruptcy in competition with the creditors of the concern? This, again, is not clear; but it is presumed he could. Certainly he ought not, for several reasons. He is *now* liable to the debts; but because the creditors did not know of him at the time of loan, and did not trust him, he is no longer to be so liable. That is *protection* enough for him. Whatsoever thing is in the reputed ownership of a trader, now passes to his assignees on bankruptcy or insolvency, and the owner has no proof for the value of such thing in competition with the creditors. Nothing can be more thoroughly in a man's reputed ownership than the capital on which he has traded. That should pass also. There are many trades besides insurance in which the capital is not wanted to be paid up, but is required to be subject to call and for use as an indemnity to creditors. In all such cases, the limited partner must be made liable to fulfil his engagements to the ostensible partner, after such partner's personal insolvency as well as before; and the rule, therefore, must of course be the same in all cases.

Further, the Law Amendment Society feel strongly that

loans made for the *permanent* service of a trade (and therefore constituting the capital of the concern) never ought to come into competition with the creditors; and that capital, on failure, should not continue as now to get back a piece of itself in the shape of a dividend upon itself. This no doubt is a part of the law of debtor and creditor, and not of partnership. There may (when the point comes under full legislative review) be a difficulty in defining those loans which ought to be brought under that category. But there is no difficulty in saying that every loan under the section of this Bill must essentially be a loan of that sort. All such loans must essentially be meant for the permanent service of the trade. True, other loans of permanent capital are by our present faulty law allowed to compete with creditors. But that is no reason for extending this class of proofs. The particular class of loan the Bill deals with, so far from *now* competing, unjustly subjects the lender to personal responsibility; and there can be no reason why, because this injustice is to be removed on the one side, another and quite new injustice should be done on the other side; and why the creditors, in losing a recourse for payment they have hitherto wrongfully had, should now find their debtor as wrongfully elevated to the position of a competitor.

Further, some provision is wanted to prevent the repayment of such loans as this section deals with just upon the eve of failure, say within six months before bankruptcy or insolvency. Such repayment should be declared to be in the nature of a fraudulent preference. Business transactions between debtor and creditor often take place on a credit so long as to make six months the shortest period which should be fixed upon, to prevent fraudulent purchases of goods, and the like, as a means of repaying capital.

It may be thought that the limitations which the Law Amendment Society desire to introduce into this Bill, would prevent persons from advancing capital for a profit return, and would make them take up in preference the position of lender at a fixed rate of interest. Practically this would not be so. When concerns are formed, people anticipate success, and the profit form of advance would therefore be more frequently adopted.

Moreover, a concern, *known* to have capitalists standing behind the creditors, and consenting not to compete with them, will claim the highest credit. The lenders are a perpetual bail for its well-doing. It would be absurd, therefore, to prohibit the advancing of capital on this secondary basis; and yet it is conceived that the Bill, as it now stands, would so prohibit it. This matter must therefore be made clear.

A direction that all partnerships in England may (as is the case everywhere abroad) sue and be sued in the partnership name is important. With reference to the question of survivorship, of legal right as between a secret partner and the personal representative of the ostensible partner, the same provision is needed. In Scotland an action lies by and in the name of a firm against any one of the partners. This Bill applies to Scotland. The necessity of assimilating the commercial laws of the three kingdoms is now admitted, and this, of itself, would render such a provision desirable, and this Bill might be extended to effect that object.

It should be borne in mind, that it is possible there may continue to be in future, as there have so often been heretofore, partnership contracts between secret and ostensible partners, by which the secret partner may still be intended to remain liable to the debts of the concern, just as the law now compels him to be. In such a case his liability should be preserved for the benefit of the creditors, they enforcing it through the equities subsisting between the two partners.

It will be found that the above considerations, if concurred in, will lead to two or three alterations in the Partnership Bill, and that these alterations would bring the Bill almost exactly into the form recommended by the Law Amendment Society, in their Resolutions of the 7th May, 1855.

Those Resolutions were the result of a most careful consideration of the subject, and the Society, on re-deliberation, still feel that they embody the correct view of the subject. Those Resolutions were as follows:—

That no person ought, by reason only of his being entitled to share in the profits of any business, to be liable to pay the debts or perform the contracts or engagements incurred

or made or entered into by the persons by whom the same is carried on.

That the persons by whom the business is carried on, or who suffer their names to be used, or themselves to be held out to the world, as partners, ought alone to be liable for the debts, contracts, or engagements of the business.

That a person ought to be allowed to become entitled to a share of the profits with a limited liability to the losses of a business, and such person should not, as against the creditors of the business, have any title to the property or assets thereof, and should be compellable to contribute the share of capital he may have agreed to provide.

That any person carrying on a business, who knowingly or willingly makes any false representation as to the liability of any person as a partner therein, or otherwise to contribute to the capital or expense thereof, and thereby obtains money, goods, or credit, should be guilty of a misdemeanour.

That any partnership should be capable of suing and being sued in the name of the firm, or description used by the partnership at the time of the right of action accruing; and service of process at the place, or any place of business of the partnership, should be deemed good service.

The Committee, therefore, consider that the Bill should stand as follows:—

1. The advance of capital or money, to be used in any trade or undertaking, not being the trade of a banker, upon a contract with the person carrying on such trade or undertaking that the person making such advance shall receive a share of the profits of the trade or undertaking, shall not, of itself, render the person making such advance a partner in such trade or undertaking.

2. The person making such advance shall not, as against creditors, have any right or title to the property or assets of the trade or undertaking; and in case of the bankruptcy or insolvency of the person carrying on such trade or undertaking, the person making such advance shall be compellable to pay to the assignees any share of capital or money which he has undertaken to provide.

3. Any such capital or money withdrawn by the person making such advance shall, if withdrawn within six months prior to the bankruptcy or insolvency of the person carrying on such trade or undertaking, be recoverable by the assignees.

4. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent a partner therein.

5. All actions, suits, and other proceedings may be commenced or defended in the name of the style or firm under which any trade or undertaking shall have been carried on.

6. Interpretation clause.

II. REPORT OF THE CRIMINAL LAW COMMITTEE ON LORD BROUGHAM'S OBSERVATIONS RESPECTING BREACHES OF TRUST.

The Committee have carefully considered the subject of Lord Brougham's observations, with a view of providing a satisfactory remedy for the evils which confessedly exist.

It appears to the Committee that breaches of trust, whether arising from criminality or from neglect, are not confined to any particular class of society; but they seem to be of more frequent occurrence in cases of trust property belonging to persons in the middle and lower ranks of life. In these cases, the trust property itself is ordinarily so limited in amount, and the parties beneficially interested therein are frequently in such moderate or even straitened circumstances, that it is wholly out of their power to resort to proceedings in equity in order to obtain restitution, or avert complete ruin. Breaches of trust also directly criminal in their nature are unhappily frequently met with among these classes, and for these there exists at present neither remedy nor punishment.

Cases of misappropriation of trust property are not, however, by any means confined to persons of the class alluded to, and the records of the Court of Chancery and of the Bankruptcy Court not unfrequently disclose frauds of great magnitude committed by persons of high standing in society. And when it is borne in mind that whenever proceedings in either of these courts,

but more especially in the latter, are resorted to, every effort is made to suppress, as much as possible, transactions which reflect upon the private character of the parties, and that those transactions only are made public where all efforts at compromise have failed, the total amount of discreditable dealings with trust property must be very large.

It cannot be doubted, that, by every principle of law and justice, the fraudulent misappropriation of trust property ought to be rendered punishable as a crime. When it is considered what important interests are confided to the honour and integrity of trustees, how many, the least able to protect themselves from fraud, and the least competent to promote inquiry, are intrusted to their guardianship; and what fearful ruin ordinarily attends the dishonesty of persons invested with so large, and practically so irresponsible a power, it seems difficult to conjecture why trustees were especially excepted from the provisions of the 7 & 8 Geo. IV., c. 29. Whatever reasons then existed for that exception, it appears to the Committee that experience, as well as reason, both concur to demonstrate the injustice, as well as the impolicy, of any longer protecting breaches of trust from criminal punishment. Considering, however, the embarrassments in which, by the rules of equity, trustees, even those who have endeavoured conscientiously to discharge their duty, are now occasionally involved, it is feared that if a law were enacted imposing additional liabilities on trustees, and also, in certain cases, making them criminally responsible, few persons would be found to accept an office which even now, in the discharge of the duties incident to it, necessarily exposes the holder to considerable difficulty; while certainly it appears to be as just in principle that honest trustees should be protected by law, as that those who are dishonest should be punished.

The Committee therefore venture to recommend, and have chalked out a measure, by which both these principles may be at once carried out; and by which, at the same time, an expeditious and inexpensive mode of inquiring into the state of trust estates may be established. Trustees who have acted conscientiously might thus be enabled at once to obtain exoneration from all liabilities by submitting their accounts to examination,

and a certificate of exoneration be granted in all cases where the trusts have been properly fulfilled. Where the trustees have desired to act correctly, but have erred in judgment, or have been misled, their errors might, by such a tribunal, be immediately corrected, and the trust property saved from ruin. Where the trustees are acting dishonestly, and misappropriating or squandering the estate intrusted to them, those interested in it might at once rescue it from their grasp, and the parties offending forthwith be brought to punishment. It is further to be especially borne in mind, that unless some summary and expeditious tribunal be established, to which the owners of trust property can have easy and cheap access, it is impossible for them to obtain an investigation into the state of their property, and so to bring to justice at once those trustees who are acting fraudulently. In order, however, to prevent vexatious measures against trustees, it is proposed that criminal proceedings against them should originate only with the tribunal to be constituted for the investigation of trusts.

Certain other provisions are proposed to be introduced into the measure alluded to, in order to render it efficient and as beneficial as possible to all parties. Resort to this new tribunal it is nevertheless intended shall be entirely voluntary, and in no case compulsory.

The following are the principal provisions contained in the measure prepared by the Committee:—

Two Commissioners, and also a certain number of Auditors of trust estates, are to be appointed by the Lord Chancellor; a descriptive statement of the property and parties to be sent by any trustee, *cestui que* trust, or the next friend, desiring an examination into the trust fund, to the Commissioners. The Commissioners may thereupon examine, or appoint a Commissioner of Bankruptcy, or a Judge of a County Court, or an Auditor, as may be most convenient, to take an examination. The Commissioners may require bail to be given by any trustee for his appearance. They may have power to employ an accountant, summon witnesses, and administer an oath. After the examination, balance-sheets and reports, signed by the Commissioner or person taking the examination, shall be registered.

Where the trusts have been duly performed, trustees may obtain a certificate of discharge exonerating from all liability. Where trusts have been violated by mistake, error of judgment, or ignorance, the Commissioners may grant a certificate, which shall be conclusive in answer to any criminal charge, but shall not exonerate from civil proceedings. Where the trusts have been fraudulently violated, the Commissioners shall order criminal proceedings to be taken against the trustee. The Commissioners may order the costs to be paid, either wholly or in part, out of the trust fund, or altogether by the trustee.

An appeal is proposed to be given from the Auditors, Bankruptcy Commissioners, and County Court Judges, to the Commissioners of Trusts. Hearings are to be in private, where the parties apply for it. Trustees and executors may apply to the Court for direction. Where a deed or will directs the trust to be submitted to the Court, it will be imperative on the trustees to apply to it; but no declaration that they need not resort to it shall exonerate them from doing so, and no releases to trustees shall discharge them from breaches of trust. The Court is to be empowered to give general directions about changing and amending investments of trust property. Provision is also made respecting the liabilities of trustees for each other, where only one party is actually guilty of a breach of trust; also for the renewal of incompetent, insolvent, or unwilling trustees, and in some cases for the appointment of official trustees. Notice of a trust for six months, and omission to disclaim it, are to constitute an acceptance of it, so as to charge liability. And trustees are to be responsible for all losses by their neglect, which are to be made charges on the estate of the trustee, and to take precedence of all other debts.

And in order to secure the punishment of embezzlements committed by trustees, it is proposed to be enacted as follows:—

“That every trustee against whom a charge of embezzlement shall be preferred, by order of the Commissioners of Trusts as aforesaid, to whom any money or valuable security shall have been or shall hereafter be intrusted, with or without any direction in writing to apply such money or any part thereof, or the proceeds or any part of the proceeds of such security, for

any special purpose, who shall, in violation of good faith, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, or who shall, by mortgage, loan, or pledge of any such security, fraudulently raise or obtain thereon any sum or sums of money in breach of his trust, shall be guilty of a misdemeanour; and being convicted thereof, shall be liable, at the discretion of the Court, to penal servitude for a term of not less than four years, or imprisonment for three years."

III. REPORT OF THE SPECIAL COMMITTEE ON THE JOINT-STOCK COMPANIES BILL.

The great object of this Bill is to allow persons associated together for any lawful purpose to form themselves, by a simple process, into an incorporated company, with or without limited liability, but subject to certain rules for the administration and management of its affairs. It discards the principle on which the present Joint Stock Companies Act is founded, viz. that it is in the power of the Legislature to prevent the institution of fraudulent companies. It limits public registration to the original formation and constitution of the company, and such changes in the latter as may be agreed on by a certain proportion of the shareholders, and also any increase of capital or change of registered office, but requires a full and complete system of registration of shareholders and amounts paid up in books kept by the company, which are made open to public inspection. Non-compliance with this and other requirements subjects the company to penalties, but does not affect its privileges or the position of the shareholders. The effect of the measure, therefore, is to require from persons dealing with such companies the same caution and discrimination as in dealing with ordinary partnerships or with individuals, and to oblige companies to rely for credit solely on the soundness of their constitution and the honesty of their transactions.

The Committee have carefully considered both the general design and the various details of the Bill as amended in committee; and, while approving of the principle of the measure and

the object it is intended to effect, they feel bound to state that many of the provisions are unsatisfactory, and that there are certain fundamental errors running through the Bill which appear to them greatly to detract from its value, and to be inconsistent with its main object and scope.

In the first place, while the Bill allows seven persons to associate themselves under its provisions, and to form themselves into an incorporated company, those provisions seem framed only with reference to large companies, where a more systematic mode of administration may be advantageous, and where the shares are transferable by the owner without the consent of the other shareholders. A company of seven would differ little from an ordinary partnership; and in such a case it might be extremely inconvenient to conduct its affairs in the manner prescribed by the Bill, and extremely desirable that the shares should not be transferable without the consent of the other shareholders. Such a company, also, should most clearly be subject to the Bankrupt Laws; but on this matter the Committee will have to speak more at length in a subsequent part of the Report. That companies consisting of a small number of shareholders might be worked in a manner advantageous both to the shareholders and to the community at large, no one who is alive to the *plastic* nature of modern commerce can doubt; and, considering the great importance that capital should be allowed to aggregate itself in whatever forms may be deemed desirable in particular cases, it seems most objectionable to prescribe by law the uniformity which the Bill enjoins, and which would greatly hamper small companies, and exclude those with shares not transferable from the benefit of its provisions.

Another fundamental error in the Bill, and connected with that already mentioned, is, that while rejecting the old system of requiring a *minimum* amount of capital as a condition of incorporation, it still requires seven or more shareholders as such condition. Now, independently of what has been already said on the first point, it is impossible not to regard this as an obvious inconsistency. If weight is to be rejected, why is tale to be retained? *Ponderantur non numerantur* is the rule which would naturally apply to a case of this nature. It is the amount

of capital and the character of the shareholders on which the credit of a company must depend, until it has obtained a stable position in the mercantile world ; the mere number of the shareholders will have the least weight with any wise and prudent man. Upon what ground of justice or policy can it be maintained that six good and honest men should be excluded from an advantage which is open to seven persons, of whatever character or reputation ? or, in fact, that there should be any condition whatever as to number, when all other conditions for the purpose of security are dispensed with ?

Another fundamental error in the framing of this Bill is, that while allowing companies not carrying on a trade or business having gain for its object, to be incorporated under its provisions, those provisions are really applicable only to companies carrying on a trade or business having such gain for its object. The registration of the nominal capital and of the shares into which it is divided, the articles of association contained in the table marked B, and the form of balance-sheet referred to in such table, and various other provisions, have reference only to trading companies, and cannot in any reasonable manner be made to apply to clubs, charities, literary institutions, and a variety of associations having intellectual or social objects in view. Now, it is of the greatest importance that such associations should be able to incorporate themselves, and to enjoy the benefit of limited liability ; and every well-wisher to the social advancement of the community must regret that the Bill has been so framed as virtually to exclude them from its operation.

Another great error in the Bill is the nature of the penalties which it proposes. With the exception of the penalty in the latter part of clause 30, the Bill imposes on the funds of the company penalties which ought to be paid by the delinquent individual. Now this the Committee consider as essentially erroneous. Defaults will, of course, most generally be made by companies under the least provident management ; and, in the event of insolvency, the consequence will be that the penalties will be found to have been levied on the funds belonging to the creditors. It is impossible, therefore, to imagine a system of penalties more likely to encourage recklessness in those who

have the direction of companies. If the worst should come to the worst, only the innocent would have to suffer.

The Committee would also observe that there are some provisions in the Bill with regard to matters not peculiar to corporations, and which, if enacted at all, ought to apply to every subject of the realm, such as those entitling companies formed under the Act to use form of conveyance, mortgage, &c., which are to have a legal effect, which they would not have if used by individuals. These are in every respect objectionable. Whether right or wrong in themselves, the Committee do not now take upon themselves to decide; but it is impolitic and unjust to offer to the new incorporations supposed privileges denied to their individual rivals in trade. Moreover, those privileges could not have been granted by charter, and this Act is nothing but a general substitute for an indefinite number of particular charters. Further, the basis of this Act is the common right of every subject, or set of subjects, to have that which is given to any subject or set of subjects; and to give peculiar privileges of the kind under consideration to companies, which are not given to individuals, is in defiance of that very basis itself. Lastly, it is the insertion of provisions of this kind which makes the consolidation and entire classification of the Statute Law a work of such extreme difficulty; and the Committee therefore feel bound to protest against a style of legislation, of which the tendency is to impede so desirable a consummation.

It appears also to the Committee that on the principle of common right, which, as already stated, forms the basis of this Bill, incorporation by letters patent under the 1st Vict. c. 73, should henceforth cease, as it is inconceivable that under the facilities for incorporation which the present Bill affords, any charter could be granted under that Act with fairness to the rest of the community. In order that the public may be aware that they are dealing with a company, the Committee recommend that no company should be registered under the name of any individual or firm.

The power given to the Board of Trade to order examination of the affairs of the company, would be more appropriately intrusted to some other authority; and the right to apply for

such examination should not be confined to the shareholders of joint-stock companies, but should be extended to the members, or sharers in the profits, of all partnerships.

The Committee would recommend that the 16th clause should be amended, so as to require that any person or persons having the conduct of a company carrying on trade or business having gain for its object, should cause true and proper books to be kept, which should *at all times* show the holders of shares in the company, the amount of calls made on each share, the total amount of calls that have been received, and the total amount of calls unpaid. Such continuous registration would be much more satisfactory than an annual list, as proposed by the Bill.

The provisions regarding winding up form, in the opinion of this Committee, one of the greatest errors in the Bill; and the amendments introduced in committee are very little calculated to render them less objectionable. The Committee have to report with reference to the 58th clause, which limits the jurisdiction of the District Courts of Bankruptcy to cases with a registered nominal capital not exceeding 5,000*l.*, and in which the registered office is situated more than twenty miles from the General Post-office, that they consider there is no principle in the limitation either of capital or distance. That of distance to twenty miles seems founded on a mistake, for at present the London Commissioners have jurisdiction within a radius of 100 miles from London; so that if the 58th clause stands in its present form, all companies whose registered office is beyond twenty miles and within 100 miles, and whose capital does not exceed 5,000*l.*, must have their affairs administered by the Court of Bankruptcy in London, supposing the London Court to come within the term "District Court;" whilst the affairs of those companies whose registered office is within twenty miles must be administered in the Court of Chancery, however small the amount of capital. The Committee are strongly of opinion that every partnership in any trade or business, having gain for its object, should be subject to the Bankrupt Laws, and that the creditors of such partnership are entitled to have its affairs administered in a Court of Bankruptcy. The Committee cannot recognise any real distinction in this respect between trading companies

constituted under the present Bill and any other trading partnerships; and if such companies are formed on the principle of limited liability, it is equally the right of the creditors as of the debtors that the affairs of the company, in cases of insolvency, should be administered by a tribunal acquainted with commercial details. The Committee therefore think it indispensable that the Law and Practice of Bankruptcy should be applied to such cases. It appears to them impossible to understand how in any other manner various questions, such as reputed ownership, preferential payments, and improvident contraction of debts which must arise, can be dealt with. And they consider, in addition, that the publicity given in this country to proceedings in the Court of Bankruptcy is a great protection to creditors, and an inducement to commercial morality.

The Committee suggest the insertion of clauses to effectuate the object above stated, and to give creditors the opportunity of compelling bankruptcy in case of nonpayment of demands upon the company, and also to enable the company, or a reasonable proportion of the shareholders, to make the company bankrupt in certain events. The Committee refer to the 7 & 8 Vict. c. 111, in which the Legislature has already sanctioned the administration in bankruptcy of the affairs of a commercial or trading company incorporated by charter or Act of Parliament; some of the clauses of which might be usefully applied to the proposed companies. They would propose the adoption of section 2 of that statute, which provides,—

“That the bankruptcy of any such company or body in its corporate capacity, as the case may be, shall not be construed to be the bankruptcy of any member of such company or body in his individual capacity.”

This will preserve the principle of limited liability, and will also absolve the shareholders from any stigma or annoyance which may attach to the bankruptcy of an individual. The Committee, however, think that in cases in which it shall appear that any shareholder of a company shall have committed any mercantile offence in connection with the affairs of the company, which in ordinary cases would render him liable to the penal sections of

the Bankrupt Laws, such shareholder should in all respects be dealt with as an ordinary bankrupt, and that he should lose the protection of limited liability, and his estate be divisible amongst the creditors of the company, if the assets be insufficient to satisfy them, or if sufficient, amongst the shareholders; and the Committee think that the Court of Bankruptcy should have power to direct an issue to try whether any individual shareholder has committed such an offence.

Entertaining these views, the Committee strongly recommend the exclusion from the present Bill of all provisions relating to the winding up of companies otherwise than by bankruptcy. It appears to them that, if the existing Winding-up Acts are inadequate and unsatisfactory, the question ought to be separately considered, and treated as a branch of Chancery procedure applicable to companies in certain circumstances. The Committee, in making these suggestions, are anxious to remove every objection which may be reasonably urged against the constitution of the proposed companies, and to afford the utmost protection to the trading community; and the suggestions now offered are founded upon the opinions of mercantile men of high standing, as well as of some of the leading members of the legal profession.

IV. REPORT OF THE STATUTE LAW COMMITTEE ON MR. BELLENDEN KER'S LETTER TO LORD BROUGHAM.

If any evidence were wanting to establish the practicability and expediency of our plan for publishing a revised and authorized edition of the Public General Acts now in force, and to prove the justice of our comments on the conduct of Mr. Bellenden Ker, as Statute Law Commissioner, it would be amply furnished by the letter which that gentleman has addressed to Lord Brougham, and which has been referred by the Society to this Committee. As our former Report contained grave charges of incapacity against Mr. Ker, it was obviously an object of great importance for him to expose any inaccuracy in our facts, or any sophistry in our reasoning; and we may therefore reasonably assume that, in attempting to answer us,

he has not omitted a single argument or assertion which could, by any contrivance, be pressed into his service. We have, however, been unable to discover—though we have most carefully perused his letter—that he has shaken in even the most remote degree any one proposition advanced by us. The success of our scheme depends entirely upon the merits of the working details which we have proposed for carrying it out; yet Mr. Ker does not hesitate to avow that he has “not attempted to go into all the details of the statements in the Report.” Indeed, upon the main points in issue between ourselves and him, he has let judgment go by default, and has contented himself with putting in a plea in abatement for non-joinder of the Lord Chancellor as co-defendant. “Whatever was done by the Board,” says he, “had his Lordship’s sanction, and I never took any step without *consulting* with his Lordship; I do not state this for the purpose of shifting any blame that may be due to me on to the Lord Chancellor; but I have reason to know that he was satisfied with what was done.” A little further on, the learned Commissioner appears to have entertained some doubt whether the plea thus framed was open to a special demurrer; and consequently he has redrawn it in the following form:—“What was done was done, as I have already stated, with the sanction of the Lord Chancellor, *under whose direction I acted*; and if what was done was not in accordance with the Lord Chancellor’s original views, it was, *I suppose*, because he, like myself, had modified his opinions.” Without stopping to consider how far this defence is consistent with Lord Cranworth’s avowal, in 1853, that he had “obtained the assistance of Mr. Bellenden Ker, *under whose direction* the work will proceed;”—and without expressing any opinion as to the value of a consultation where the parties consulting are left to form mere suppositions respecting the modifications of each other’s views;—it will be desirable to contrast the passages cited above with another passage, contained in Mr. Ker’s third Report. “I should state,” says he, “to avoid misapprehension, that I do not consider that my responsibility extends to the details and execution of the different Bills prepared and submitted by my colleagues; and I may add, that even if those Bills

should be found defective or unsatisfactory (though I am far from anticipating any such judgment), it would not prove that the plan which I propose is impracticable or objectionable; but only that the workmen employed were inadequate to the task." Now, certainly, if these two antagonistic defences are allowed to stand, Mr. Ker's position, during the last three years, has been a very convenient one. He has nominally been the President of one of the most important Boards ever established for the amendment of the law; he has been enjoying all the consideration and respect which attaches to a person occupying that position; he has been receiving the substantial reward of his services in the shape of 1,000*l.* per annum; yet he has contrived so to arrange matters as to avoid all responsibility. He is not responsible for the acts done by the Board, because they were done by his subordinates; he is not responsible for the orders given, because they were given under the direction of the Chancellor.

But Mr. Ker, not content with stating facts to show that the Lord Chancellor has been equally open to blame with himself, is obviously anxious to make the noble President of this Society a co-defendant also. In our Report we had observed that Mr. Ker "was a member of the Commission appointed in 1835¹ to consolidate the Criminal Law;" and that "the one grand mistake made by that body was, that, instead of digesting into a single statute all the enactments relating to crime, it undertook the ambitious task of attempting to reduce the whole Criminal Law into one written code." On this passage Mr. Ker thus comments:—"Now, if I was in error, I erred in good company, at least. Your Lordship, when Chancellor, issued the Commission, *directing this to be done, not desiring inquiry whether it was expedient to do it.*" The Commission lies before us, and so far from bearing out the above statement, it conclusively proves the exact contrary. The material words are as follow: "Know ye, that we, reposing great trust, &c., do authorize and appoint you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and John Austin, or any three or more of you, to *digest into one statute*

¹ This is a misprint for 1833.

all the statutes and enactments touching crime, and the trial and punishment thereof; and also to digest into one other statute all the provisions of the common or unwritten law touching the same; and to inquire and report how far it may be expedient to combine both those statutes into one body of the Criminal Law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first-mentioned only of the said statutes." But this is not all, for the Commissioners did inquire into the subject, and in June, 1834, they presented an elaborate Report, recommending in the strongest language the union in one digest both of the written and the unwritten law. This Report is signed by Mr. Bellenden Ker.

We pass on now to a second inaccuracy contained in the letter before us. Speaking of the "Expurgatory List," Mr. Ker observes, that it was "*a mere rough sketch, to ascertain generally what statutes were in force,*" and he adds, in another connection, "*It was desirable that it should be ascertained (not for the purpose of publication, but as a guide to those employed in consolidation) what statutes were or were not in force; and hence the list prepared by Mr. Anstey and Mr. Rogers.*" Now, if we turn to the letter written by Mr. Ker to the Lord Chancellor on the 20th May, 1853, we shall find this passage:—"It was arranged that Mr. Anstey and Mr. Rogers should proceed with a *careful examination* of the statutes, commencing with the earliest, and should make a list of such as are obsolete or expired, or directly or virtually repealed, for the purpose of making a report to your Lordship, enumerating those which it may appear desirable at once to repeal or declare repealed, *in order to remove so much useless matter from the Statute Book.* In these lists great progress has been made; and Mr. Anstey and Mr. Rogers expect, I believe, to have completed the revision of the whole Statute Book (for this preliminary purpose) before the end of the present session." In Mr. Ker's first Report to the Chancellor, the subject is again thus mentioned:—"It was the wish of Mr. Anstey and Mr. Rogers that the whole of their Expurgatory List should be added to this Report; but for the present purpose I conceived that it would be sufficient to furnish a few specimens of the different parts of *this very laborious*

work, the whole of which has been delivered to me; and *I propose*, as soon as some additions have been made to their lists, and when the whole have been revised, that *these should be printed for public use*, as they will be *very valuable* until the revision of the whole Statute Law shall be accomplished." Again, in his second Report, he expresses the same sentiments. "I still think," says he, "as suggested in my first Report, that as soon as the list of Messrs. Anstey and Rogers is revised, with, perhaps, the addition of some further details, *it would be a convenience to the public that it should be printed for distribution.*"

We must next draw attention to a third inaccuracy. Mr. Ker, in his letter to Lord Brougham, remarks, with respect to Mr. Coode's critical examination of the statutes :—"I thought it fit that a *specimen* of this mode should be prepared, but *it being always recollected that nothing was to be undertaken that could not be completed within the experimental year*,—for the appointments were expressly confined to one year, and the vote of Parliament was only for that period,—*it would have been idle to let Mr. Coode proceed with such a task.* It must have taken far more than a year." Had Mr. Ker always recollected that nothing was to be undertaken that could not be completed within the year, he would have confined the attention of his colleagues to a single subject, and would not have allowed them to fritter away their energies on a multitude of matters which could not by possibility have been completed within ten times that period. Nay, he would never have permitted Mr. Coode to commence a task which "it would have been idle to let him proceed with." But waiving these considerations, let us see whether Mr. Ker, at the outset, really intended that Mr. Coode should merely prepare a "*specimen*" of his mode of examining the statutes. This question he shall answer for himself, not by what he states in 1856, but by what he stated in 1853. In his letter to the Lord Chancellor, to which we have already referred, the following words occur :—"Mr. Coode has been employed on a critical examination of the statutes on a different system, beginning with the latest statute, for the purpose of ascertaining, exhaustively, what is the law now in force; this will enable him, *when his task is finished*, to check and complete

the lists of Mr. Anstey and Mr. Rogers." It is true that Mr. Ker, in making this last statement, evinces a remarkable ignorance of the real character of the work in question; for the "Chronological Register" of Mr. Coode is drawn up in such a form as to be utterly useless for the purpose of checking the "Expurgatory List" of his two colleagues. Still, who can doubt, in the face of this extract, that Mr. Ker's original intention was, that the task intrusted to Mr. Coode should be finished, and that the idea of the preparation of a "specimen" is a mere afterthought?

A fourth inaccuracy will be found in p. 6 of the letter. "As to the impossibility of having a really *authorized* edition," says Mr. Ker, "the answer given by your Committee to my statement on the point is, that Parliament may and does give powers to the courts and to *large corporations* to make rules and *bye-laws*, and therefore it might give authority to certain commissioners or other persons to prepare a new edition of the public statutes, which, after having been laid before both Houses, should be treated as an authorized edition." And he adds, in a triumphant tone,—“But surely it is a considerable stretch of an argument to say, that because Parliament may safely and properly leave *bye-laws* to be made in certain cases by *public bodies*, it may therefore safely and properly intrust to a body of commissioners an *absolute power* over the whole Statute Law of England!” No doubt, such a statement would be “a considerable stretch of an argument;” but our answer is, that the whole passage cited seems to have been written by Mr. Ker as “a specimen” of what he can achieve by a considerable stretch of imagination. It is scarcely credible, but it is strictly true, that our Report does not contain a single syllable which can be twisted into an allusion either to corporations or to bye-laws, nor does it hint at the possibility of intrusting to commissioners an absolute power over the Statute Law. What is stated in the Report is simply this:—In answer to a technical difficulty suggested by Mr. Ker, that a new edition of the statutes “*could not* be made a work of superior authority to any other selection,” except “*by being actually placed on the Statute Rolls*,” we contended that this suggestion was unwarrantable in law, and we instanced the new

rules of pleading and practice, which have recently been promulgated by the Judges. We showed that these rules—which, be it remembered, play quite as important a part in the administration of justice as the provisions contained in the Common Law Procedure Acts themselves—have now, notwithstanding that they have never been placed on the Statute Rolls, the full force of ordinary enactments, in consequence of their having been submitted to Parliament, and left unaltered by the Legislature for a specific period. We then asked, “What is to *prevent* Parliament from empowering and directing certain commissioners, &c., to prepare a new edition of the Public General Acts now in force, which edition, when printed, should be laid before both Houses, and if not questioned within three months, should be treated as an ‘authorized’ edition?” It will be observed that the whole of the above reasoning was levelled at what we justly described as Mr. Ker’s “astounding assertion;” and that the mode of proceeding referred to by us forms no part of the plan recommended in our Report. We merely wished to prove that Parliament was not precluded, as Mr. Ker contended it was, by any inconvenient form, from investing with legislative authority whatever edition of the statutes it might, in its wisdom, deem deserving of superior credit. The plan which we actually recommended is contained in our eighteenth Resolution, and is to the following effect:—“To confer on the new edition, when completed, proper legislative authority, an Act must be passed to declare that no public general enactment which is not inserted in that edition, and which has been passed prior to its date, shall be of any force or effect, except so far as it may relate to acts done, rights and titles acquired, or liabilities incurred under it.” And we are at a loss to understand how such a plan can be fairly characterized as one which, in the language of Mr. Ker, involves “the abdication by Parliament of its duties in favour of certain commissioners to an extent quite unjustifiable, and entirely out of the question.” So far from suggesting that Parliament should abandon any of its duties or functions, we expressly provide that it should perform them in the ordinary mode. When the Bill is brought in to confer legislative authority on the new edition, it will become the duty

of each House to withhold its assent to the measure until satisfactory proof be furnished that the work in question is really what it purports to be, and that it has been prepared with sufficient care and circumspection to warrant the Legislature in granting to it the distinction prayed. Nor will such proof be difficult of attainment. Of course, no one imagines that it will be necessary for a committee of either House to examine in detail, and page by page, the different volumes of the new edition, in order to form an opinion as to the accuracy of the commissioners by whom it has been prepared; but the merits of the edition can be tested, and most fairly tested, by selecting ten or twelve separate portions of the work, and by then ascertaining, either with or without the aid of skilled witnesses, how far the process of expurgation has there been performed. In other words, the "bulk" of the new edition will be judged of by the "samples." This is the process universally adopted whenever any Consolidation Bill, or other measure of unusual length or complexity, is brought under the notice of Parliament; and if a more minute investigation were instituted in these cases, the business of legislation would inevitably come to a dead lock. What chance would Sir Robert Peel have had of passing his admirable measures for reforming the Criminal Law, if no reliance had been placed on the draughtsmen employed by him, and if Parliament had determined to examine, section by section, the 130 Acts which he repealed by 7 & 8 Geo. 4, c. 27? We claim for the draughtsmen who shall prepare the new edition of the statutes the same amount of public confidence—no more and no less—which has uniformly been placed in gentlemen who have been intrusted by Government with the preparation of important Bills; and to contend, as Mr. Ker does, that if Parliament were to repose this limited trust in their zeal, ability, and discretion, it would "unconstitutionally abandon its functions," and confer "absolute power on the draughtsmen over the whole Statute Law of England," is to sacrifice common sense at the shrine of mere idle declamation.

We now propose to furnish two "specimens" of Mr. Ker's reasoning powers, and we trust that they will be considered by the Society as sufficient samples of the bulk of his logic. In

our Report, p. 13, we contended that a revised edition of *all* the Public General Acts now in force was not a work which could be executed by private enterprise, and we gave two reasons for arriving at this conclusion:—First, that no private publisher had ever yet attempted to bring out such an edition; and, next, that an edition coming from a private press could not be regarded as an authorized edition, and would therefore be comparatively useless. Mr. Ker takes no notice whatever of the second reason assigned, but he really seems to imagine that he has successfully answered the first by asserting, “that private enterprise *has* undertaken, and repeatedly, the publication of *selections, more or less copious*, of the laws now in force.” He then cites Evans’s “Collection of Statutes connected with the General Administration of the Law,” and Chitty’s “Collection of Statutes of Practical Utility;” and he adds, that “almost every treatise on a particular branch of the Statute Law contains a collection of the statutes, which a person, inquiring into that branch, would wish to refer to.”

Precisely the same fallacy will be found at p. 2 of the Letter. In our Report, we had censured Mr. Ker for employing one of his subordinates in the preparation of a digest of the *whole* Statute and Common Law relating to Distresses for Rent; and he meets this objection by gravely announcing, that “it was not new to introduce *parts* of the Common Law, or to make amendments of the Common Law in a Consolidation Bill.”

But perhaps the most remarkable passage in Mr. Ker’s Letter remains to be noticed. At p. 8 of our Report the following sentence occurs:—“The Statute Book at present consists of forty ponderous quarto volumes, each volume on an average containing about a thousand closely-printed pages.” This seems to be a harmless mode of expression, which, inasmuch as the edition of the statutes referred to does not contain at full length *every* public Act that has passed, rather understates than overstates the fact. But Mr. Ker is evidently much shocked at what he is pleased to call “this fallacious mode of expression.” “What,” says he, “is meant by the ‘Statute Book?’ There is no such work known to the law.” And a little further on he adds:—“It may or may not be advisable that a new edition of

the statutes actually in force should be prepared at the public expense ; but, at any rate, the *bulk* of these forty volumes is a matter entirely beside the question, and ought never to be mentioned by persons who wish to appeal to reason, and think it unfair to use arguments which owe all their effect to the ignorance or thoughtlessness of their audience."

In answer to this lecture on the dishonesty of using sophistical reasoning,—a lecture, be it observed, which comes with no peculiar grace from one who has made the statements and employed the arguments adverted to in our previous observations,—we shall content ourselves with adopting Mr. Ker's formula of defence, and merely observe, that if we have been in error, we have erred in good company, or at any rate in that of the learned commissioner. Mr. Ker asks, with surprise, "What is meant by the Statute Book?" and we ask, with surprise, what the questioner means by asking this question, when he himself, in his Report of July, 1835, has used the same expression at least twenty times,—when, in his letter to the Chancellor, of the 20th of May, 1853, he states in one place, that "Mr. Anstey and Mr. Rogers expect to have completed the revision of the *whole Statute Book* before the end of the present session;" and, in another, that his object is to remove "useless matter from the Statute Book,"—and when, in each of his Reports, dated respectively August, 1853; January, 1854; May, 1854; and July, 1855, the same obnoxious phraseology is not once or twice, but repeatedly, employed? But, possibly, Mr. Ker may contend that he does not so much complain of the use of the term "Statute Book," as of the reference to "the bulk of the forty volumes." Is this so? We shall see, if we turn to the Report of the Commissioners on the Consolidation of the Statute Law, which was presented to Parliament in 1835. This Report is signed by Mr. Bellenden Ker, and we have his own authority for stating—first, that he took an active part in drawing it up (see p. 3 of Rep., 27th Jan. 1854); and, next, that he owes his present position solely to the fact of his having been so engaged (see p. 4 of Letter). We are therefore fully justified in assuming that he must have sanctioned, if he did not actually write, the following passage, which we quote

from p. 11 of the Report :—"The Statute Law is rendered less accessible by its now extraordinary *bulk*, the result of an accumulation of enactments during the space of more than six centuries, without any effectual systematic effort to reduce the aggregate by a general consolidation; so that the number of public statutes now in force, together with many expired and repealed statutes and enactments at present printed in the collections in common use, occupy not fewer than *thirty closely-printed quarto volumes, containing from 600 to 1,200 pages each*, and costing from 30*l.* to 40*l.*" The Report then goes on to observe, in the same and the following page, that "the *Statute Book* is further encumbered with numerous obsolete provisions;" "that the *Statute Book* abounds with enactments relating to particular classes," &c.; "that numerous instances of neglect of economy in the wording of statutes give them a considerable degree of importance by materially increasing the *size of the Statute Book*;" and that "the expurgation which we recommend would reduce the *Statute Book* to one-fifth of its present size."

It only remains for us to state that we cordially concur in every word contained in two paragraphs of Mr. Ker's letter. In the one passage he naïvely remarks, "If the work were again to be done, I do not think, notwithstanding the observations made in the Report of your Committee, *I could do better*;" and in the other, he very properly describes his answer to our comments on his conduct as a "*few hasty observations*."

We observe that, in a note appended to Mr. Ker's letter, he makes some strictures on a Bill "for the further Relief of the Subject from Penalties and Disabilities touching Religion and Religious Worship," which was brought into the House of Lords last year by Lord Brougham. It appears that the intention was to repeal by this Bill ninety-nine statutes, and Mr. Ker asserts, that although the measure was carefully prepared by three able lawyers, it was open, among other objections, to this one, viz. that out of the ninety-nine Acts proposed to be repealed, "seven had been already expressly repealed,

while sixteen had expired, or had performed their office." With the justice or injustice of this criticism we have nothing whatever to do, and we only allude to it for the purpose of pointing out, what is indeed sufficiently self-evident, that *if* the facts be as stated by Mr. Ker, they show how extremely difficult it is for draughtsmen, who are dealing with any isolated subject, to extract from the Statute Book, in its present state, the actual law relating to that subject. In other words, they furnish the strongest possible argument against Mr. Ker's proposal for commencing proceedings by a series of unconnected Consolidation Bills, and in favour of our plan for a revised and authorized edition of the statutes now in force.

APPENDIX.

LETTER FROM MR. H. BELLENDEN KER TO LORD BROUGHAM.

DEAR LORD BROUGHAM,

THE Report on the Statute Law by the Special Committee of the Law Amendment Society contains some observations on my conduct whilst I acted on the Statute Law Board, which, I think, in some degree misrepresent me.

I have determined to send you a few observations on this Report.

Hitherto I have not noticed in any way the attacks made on me, and I should not have departed from my rule if you had not been the President of the Society.

The Lord Chancellor's Secretary, in his letters to the persons appointed on the Statute Law Board of 1853, stated that Her Majesty's Government intended to proceed without delay in the work of consolidation of the Statute Law, according to the announcement of the Lord Chancellor in the House of Lords; that as the scheme was necessarily to some extent experimental, his Lordship thought it best to confine his plan to what could be done in one year; and that the proceedings were to be directed by me, under the Lord Chancellor's own immediate superintendence.

Whatever was done by this Board had his Lordship's sanction, and I never took any step without consulting with his Lordship. I do not state this for the purpose of shifting any blame that may be due to me on to the Lord Chancellor; but I have reason to know that he was satisfied with what was done. The Board was an experiment. Many opinions had been formed as to what was to be done,

and the best mode of proceeding; and, as far as I was concerned, a more practical consideration of the subject led, I own, to a change of opinion on many points.

It seemed to me to be clear that it was advisable to begin by consolidating particular groups of statutes, so that wherever there was more than one statute relating to the same subject, these should be consolidated into one Act.

Then numerous questions arose whether the exact words of the statutes should be retained, or whether the law should be re-written.

It was desirable that it should be ascertained (not for the purpose of publication, but as a guide to those employed in consolidation) what statutes were or were not in force, and hence the list prepared by Mr. Anstey and Mr. Rogers.

Mr. Coode suggested another mode of examination of the statutes far more elaborate and complete.

I thought it fit that a specimen of this mode should be prepared, but it being always recollected that nothing was to be undertaken that could not be completed within the experimental year—for the appointments were expressly confined to one year, and the vote of Parliament was only for that period—it would have been idle to let Mr. Coode proceed with such a task. It must have taken far more than the year, and could only have been completed at a great expense of money and time; and even the Report of your Committee does not seem to regret that this elaborate work was not proceeded with to its completion.

Specimens of consolidation of various groups of statutes were prepared, to serve either as models, or by way of showing the difficulties, so as to enable a project to be formed as to the best mode of proceeding in the task of consolidation of the whole Statute Law.

The gentlemen employed were invited to state their views on all points connected with the task of consolidation, and generally as to the best mode of carrying out the Lord Chancellor's directions.

It was a question of much importance to consider how far in any particular case the Common Law should be incorporated, and Mr. Brickdale was requested to take a short subject, "Distress for Rent," and make, 1st, a mere Digest of the Statute Law; 2nd, of the Statute and Common Law united; 3rd, a Digest or Code of the whole Law, containing such improvements and simplifications as appeared desirable, without, however, departing from any general principles of the English Law.

Now it was not new to introduce parts of the Common Law, or to make amendments of the Common Law in a Consolidation Bill. This had been done in Sir Robert Peel's Bills and some others; and whoever undertakes the task of consolidating the Statute Law will on some particular heads find it almost imperative to incorporate some of the Common Law, to make the Act intelligible.

The Committee's Report, however, observing on this, says, "That until the Statute Law had been consolidated and digested, no attempt

to blend in a single code the written and unwritten law on any subject will have the most remote chance of receiving the sanction of the Legislature. Of all men living, Mr. Ker had the best reason for being aware of this fact. He was a member of the Commission appointed in 1835 to consolidate the Criminal Law; and the one grand mistake made by that body was, that instead of digesting into a single statute all the enactments relating to crime, it undertook the ambitious task of attempting to reduce the whole Criminal Law into one written code."

Now, if I was in error, I erred in good company at least.

Your Lordship, when Chancellor, issued the Commission, directing this to be done, not desiring inquiry whether it was expedient to do it. Lord Lyndhurst, when Chancellor, issued the Second Commission for the revision of what had been done. The late Mr. Starkie, Mr. Justice Wightman, Sir Edward Ryan, the late Mr. Richards, Mr. John Austin, and Mr. Amos, all concurred in the Reports,—all felt certain that great advantage would arise from the experiment.

Your Lordship more than once brought into the House of Lords a Bill containing the whole Digest, and Lord St. Leonards, when Chancellor, brought in a Bill embodying a material part of the Digest; and I shall always consider that if our Report, and consequently the Bill, had not been encumbered by certain definitions of words which had already a known or definite meaning, as "malice," "unsound mind," "wilful," &c., Lord St. Leonards' Bill would have passed.

With respect to the list of Messrs. Anstey and Rogers, what was done was a mere rough sketch, to ascertain generally what statutes were in force. This would of course have been followed by a further examination of the parts of statutes repealed and the points where it was doubtful as to whether an Act was or was not in force; but it would have been idle to attempt this task within the year. What was done was a series of experiments and examples, accompanied by many valuable suggestions on the different points that it would be absolutely necessary to consider before the scheme for the undertaking the whole operation was finally settled. As regards the papers by Mr. Brickdale on the rewriting certain statutes, there was an important question to be decided, as to how far an existing statute, which was manifestly imperfect or obscure, should be rewritten, removing the difficulties of the existing law, and adding the effect of decisions on particular branches of it.

The Wills Act was taken as a specimen, and whether it was well or ill done it is not for me to decide. However, some persons of authority consider that it was a successful experiment. At all events, it was fit to be done, as affording the best means of enabling others to form a correct judgment as to how far the course should be adopted—a question which I consider of great practical importance in any scheme of consolidation of the Statute Law, which must always include, to a certain extent, revision of the law.

After maturely considering what was done within the year, and

remembering that what was done was merely experimental, I feel satisfied that the materials collected were valuable, and that my Reports brought forward and discussed many of the difficulties which must attend the actual execution of a complete consolidation; and if the work were again to be done, I do not think, notwithstanding the observations made in the Report of your Committee, I could do better. What was done, was done, as I have already stated, with the sanction of the Lord Chancellor, under whose direction I acted; and if what was done was not in accordance with the Lord Chancellor's original views, it was, I suppose, because he, like myself, had modified his opinions.

The Lord Chancellor may have erred in the selection he made. The sole ground, however, of my appointment was, as he expressly stated, that I was the only person who had acted on the former Commission for considering the expediency of consolidating the Statute Law, who was in a situation to accept the office.

I may add that your Lordship (as appears by a note to the third of the Reports made by me to the Lord Chancellor in 1853 and 1854) allowed me to state, that you thought in the main the scheme I proposed was practicable and proper to be adopted; and Lord Lyndhurst also considered that the plan laid down was satisfactory.

I own that such approval enables me to bear with equanimity any observations made in the Report of your Committee, either as regards my conduct or capacity. And, moreover, I may observe that the Statute Law Commission adopted in the main all that had been proposed by me in my Reports; and I think it would be idle to assume that the members of that Commission adopted my suggestions without consideration, when it is recollected that the Report was signed by the Lord Chancellor, Lord Lyndhurst, your Lordship, Lord Campbell, Chief Justice Jervis, Lord Wensleydale, Sir W. Page Wood, Mr. Walpole, and others.

The Report proceeds to observe on my "master blunder," in not first ascertaining, "with as much precision as possible," how much of the Statute Law was still in force; and then concludes with a proposal for a plan of a new edition of the statutes. I shall venture to make a few observations on some of the points laid down in this part of the Report.

"The Statute Book at present consists of forty ponderous quarto volumes," &c. (p. 8 of Report). This is a repetition of a fallacious mode of expression, which has been already exposed by me in my Second Report (p. 5). What is meant by "the Statute Book"? There is no such work known to the law. If the complete series of all the Acts of Parliament ever passed is meant, that consists of much more than forty quarto volumes—I believe some 200 folio volumes; and if a collection of those Acts only which are now in force is meant, it would probably consist of "ten or twelve octavo volumes" only (according to the estimate in this Report). It is true that there is an edition, or rather a series, of triennial or biennial quarto volumes, now amounting to some forty, called the "Statutes

at large;" but they are not the statutes at large, for they abridge or omit many even of the "Public General" Acts; and having been published periodically, of course the earlier volumes contain a great proportion of Acts which are now not in force. There is no more reason for calling this edition or series "the Statute Book" than for giving that title to "Chitty's Collection of Statutes of Practical Utility," which is in four volumes octavo.

It is not unimportant to expose this fallacy, for the use of the term "the Statute Book" produces the impression that these forty volumes are a code put forth by the supreme authority as the law of the land; and from this all kinds of unreasonable inferences are drawn as to the duty of the State to produce a revised and corrected edition of that code. In this sense there neither is, nor ever has been, any such thing as the Statute Book. It may or may not be advisable that a new edition of the statutes actually in force should be prepared at the public expense; but at any rate the bulk of these forty volumes is a matter entirely beside the question, and ought never to be mentioned by persons who wish to appeal to reason, and think it unfair to use arguments which owe all their effect to the ignorance or thoughtlessness of their audience.

"It may very fairly be contended that a revised edition of the statutes is not a work which can be undertaken by private enterprise," &c. (p. 18 of Report).

As to the first of the reasons given to support this assertion, the answer is, that private enterprise *has* undertaken, and repeatedly, the publication of selections more or less copious of the laws now in force, adapted to meet the varied wants of the public. There are Evans's Collection, and Chitty's Collection; the quarto edition, commonly called the "Statutes at Large," is itself in reality a publication of this kind; and almost every treatise on a particular branch of the Statute Law contains a collection of the statutes which a person inquiring into that branch would wish to refer to. I contend that, practically, the real wants of the public are better supplied by publications of this kind, produced according to demand by those whose business it is to watch the public with reference to these matters, than they ever would be by publications undertaken by the State.

As to the impossibility of having a really *authorized* edition, the answer given by your Committee to my statement on the point is, that Parliament may and does give powers to the Courts and to large corporations to make *rules* and *bye-laws*, and therefore it might give authority to "certain Commissioners or other persons" to prepare a new edition of the Public Statutes, which, after having been laid before both Houses, should be treated as an "authorized" edition, at least to this extent, "that no enactments excluded from that edition should be of any force." But surely it is a considerable stretch of an argument to say, that because Parliament may safely and properly leave bye-laws to be made in certain cases by public bodies, it may therefore safely and properly entrust to a body of

Commissioners an absolute power over the whole Statute Law of England! I conceive, on the contrary, that Parliament would never entertain such a proposal for a moment; and that if it did, it would be a most improper and unconstitutional abandonment of all its duties and functions.

With respect to the "Resolutions" of the Committee, the general purport of them is that an "authorized" edition of the Public Statutes should be prepared, omitting all Acts or parts of Acts which are expired, obsolete, or *expressly* or *impliedly* repealed, as to which edition, when completed, there should be an Act to declare that no public general enactment which is not inserted in it should be of any force or effect. Omitting criticism on minor points (such as the question what are public general enactments, and very many others which present serious difficulties), the effect of this proposal is, so far as regards Acts unequivocally expired or repealed, that there should be an Act to declare that repealed Acts are repealed, and that expired Acts have expired; and as regards implied repeals, that the Parliament should (as already objected) abdicate its duties in favour of "certain Commissioners" to an extent quite unjustifiable and entirely out of the question.

I hope you will not think it improper to lay these few hasty observations on the Report of the Committee before the members of the Society at its next meeting. I should observe that I have not attempted to go into all the details of the statements in the Report.

I remain,

My dear Lord,

Your faithful Servant,

H. BELLENDEN KER.

LINCOLN'S INN,

February, 1856.

Notes.—I could not produce a better example of the difficulty there must always be in any attempt to repeal any large body of the Statute Law without the most careful and laborious consideration, than by referring to a Bill brought into Parliament last year by your Lordship, "for the further Relief of the Subject from Penalties and Disabilities touching Religion and Religious Worship." In the preparation of this Bill you had the assistance of your learned friend Mr. Field, of the Chancery bar, and of that gentleman's brother, and also of Mr. Anstey, whom you characterize (and most justly I conceive) as a learned and indefatigable fellow-labourer. This Bill proposes to repeal ninety-nine English statutes, in whole or in part. It having been referred to the Statute Law Commission, it became my duty to consider in detail the different statutes to which it referred. Of the ninety-nine, seven had been already expressly repealed; sixteen had expired or had performed their office. I am aware that some advocate the necessity of clearing the Statute Book, as it is termed, by repealing all Acts not in force. I cannot see the propriety of this, and in some cases it must be wrong, as the repeal of the attainder of Sir Thomas More. Thirteen I conceived were not fit to be repealed without much detailed discussion. I may, however, give an example of one, 29 C. 2, c. 9, which abolishes the writ *de hæretico comburendo*, reserving the ecclesias-

tical jurisdiction in heresy and the power to proceed therein as therein is mentioned. Now if this statute had been repealed, it would have revived the writ. What was intended, I assume, was to repeal the reservation. As regards the rest of the ninety-nine Acts, so far as their repeal might be advisable, they could only with propriety be repealed by at the same time amending and consolidating the law relating to—

1. The Constitution and Services of the Church.
2. Process of the Ecclesiastical Courts.
3. Oaths, Parliamentary.
 „ Office.
 „ Judicial.
4. Naturalization.
5. Scotch Universities and Education.
6. Guardianship.
7. Protestant Dissenters.
8. Registration of Dissenting Chapels.
9. Roman Catholics.
10. Scotch Episcopalians.

H. B. K.

ART. IX.—CURRENT LEGAL LITERATURE.

1. *Smith's Leading Cases*. 4th ed. By MR. JUSTICE WILLES and MR. KEATING, Q.C., M.P.
2. *Blackstone's Commentaries abridged*. By SAMUEL WARREN, Esq., Q.C., M.P.
3. *Commentaries on the Common Law*. By HERBERT BROOM, M.A., Reader in Common Law to the Inns of Court. London: Maxwell.

THE titles above collocated, of works occupying several and distinct portions of the field of legal literature, and addressed to different classes of readers or students of our law, suggest to us important questions, which are now beginning somewhat vehemently to agitate and perplex the mind of the community. Is law susceptible, as any other science, of being exhibited in a definite shape to the inquirer's eye,—of being mapped out,—reduced within fixed rules and principles, and put forth as an intelligible whole? Is our law, indeed, but a crude and ill-digested mass of subtleties and arbitrary *dicta*,—of statutory provisions, untranslatable by the vulgar,—of precedents which

by seeming analogies invite but to destruction the unwary or unadvised? These are questions to which none who had pondered on and considered them would willingly respond with a simple Yea or Nay. And there is another problem still behind, to the solution of which the thinking part of our population is beginning steadfastly to apply itself. Can the codification of our common or unwritten law successfully be attempted? If carried out, would it effectuate the ends which those who advocate codification have in view? Questions such as these—of grave and serious import—suggest themselves to us on perusing the titles merely of the works prefixed to this article; by any one who examines, with even moderate assiduity, their contents, the importance and pertinency of the queries above submitted will most indubitably be recognised. In these *Leading Cases*, selected with a cautious and unerring judgment,—in these *Commentaries upon the Law*, abridged and condensed within the very strictest limits,—we find compressed and methodized an amount of matter tested as to its accuracy by the most recent decisions, and elaborated with the most earnest care, which, we really think, might go far towards supplying the desideratum of a code to the full as good as that of our continental neighbours; or at all events might convince the most stubborn and sceptical of non-codifiers, that the plan which has been proposed for their acceptance is feasible and sound. Without, however, committing ourselves at this moment to a decided opinion in reference to the point here mooted, we can very earnestly deprecate one objection, which we have occasionally heard put forward to the scheme of codifying our common law:—"Granted that this be done," it is said, "how many cases annually will call for judicial settlement not falling within the letter of the code?" To which the answer offered is, "So many that the code itself will prove to be of little use, perchance will become an incumbrance, instead of a help, to the administrators of justice." Now, admitting that reports will still be needed—not a whit less than at present—by that race of lawyers who shall witness the promulgation of a code; admitting, as we most unfeignedly do, that laws cannot be framed or organized applicable "to every possible transac-

tion,"—every contingency or state of facts,—we yet think that the public has a right to demand that the leading rules, civil as well as criminal, which are to govern it, shall be presented in a clear, simple, and intelligible form, so that he who will may read, learn, and understand them. That the object here indicated might be effected by a code, and never has been or will be effected by treatises of a technical character, or by critical disquisitions upon decided cases, we most surely and most cordially believe.

During that long interval, however, which will indubitably elapse ere the codification of our Common Law be realized, recourse must be had for information upon legal topics to Treatises and Commentaries upon Law, to Selections of Cases, or to the Reports themselves, of which the arrears, accumulated for centuries, have now to be digested by the lawyer. In this belief, and without further preamble, we shall proceed to direct the attention of our readers very briefly to the list of books noticeable *suprà*.

To the fourth edition of "J. W. Smith's Leading Cases," by Mr. Justice Willes and Mr. Keating, we have applied ourselves with very lively interest. In the first volume, we mark the omission, necessitated by recent changes, of four cases; viz., *Aslin v. Parkin*, *Crogate's case* (for which has been substituted *Taylor v. Cole*, 3 T. R. 292), *Robinson v. Raley*, and *Trueman v. Fenton*. In the second volume of the work before us, one case—*Bent v. Baker*—is omitted, and one—*Doe d. Didsbury v. Thomas*—is added. To the report of *Godsall v. Boldero* is subjoined that of *Dalby v. the India and London Life Assurance Company* (15 C. B. 365); and in the Note appended to these cases various important additions and alterations have been made.

With reference to a book so very well known and thoroughly appreciated as this, laudatory remarks would be superfluous. We shall, however, be of some service to such of our readers as are conversant with the preceding edition of it, by suggesting a perusal of the following passages:—The observations as to the science and system of pleading since the passing of the Common Law Procedure Act, 1852; and as to New Assignments,

and the consequences which are now to be apprehended from a mistake in the form of action (vol. I. pp. 102—105, and 358); the rule of law applicable where the plaintiff has himself contributed to an injury caused mainly, or in part, by the defendant's negligence (*id.* p. 220); and the lucid statement of the law exhibited under the form of nine distinct propositions, touching "the exoneration, satisfaction, or discharge of debts or demands not under seal,"—a subject very complicated and difficult.—(*Id.* p. 253.)

In the second volume of this work we observe, that in commenting on *Hadley v. Baxendale* (9 Exch. 341), the learned editors give as their opinion that the rule there laid down "is one which it would be in many cases difficult to apply in its precise terms, and it was not perhaps intended to lay down that the amount of damages should depend on the *mere* knowledge or ignorance of the defendant of the surrounding circumstances, apart from contract, express or implied, to be liable for the extraordinary amount of damages to which those circumstances might give rise; and, reading the expressions in the judgment *secundum subjectam materiem*, they appear capable of this construction."

Of Mr. Warren's work we have already recorded a favourable opinion in these pages (*Law Magazine* for August last, p. 8); it is a masterly abridgment of Blackstone's Commentaries, and much more than an abridgment, inasmuch as the changes in our law are here traced out down to the most recent period, and explained with much care, clearness, and conciseness. "It is considered," remarks the author, "that the proper method of preparing for the public such a work as the present, is to conceive, if possible, how Sir W. Blackstone would now look at the edifice of our laws and constitution after a century's legislation, giving him credit for being himself imbued with the spirit of an age entitled to be regarded as one of progress and enlightenment. It has been endeavoured to do this in the present volume, which may be regarded as a synopsis of our laws and constitution as they stand in the year 1855."—(Introd. p. xlix.) The object here set forth has, we think, been zealously kept in view and faithfully carried out by the learned compiler of these

Abridged Commentaries. They should be put into the hands of the student of our law as a first book, wherein, if well advised, he will read with special care and attention those chapters which treat of our Constitution and forms of Government; of the British Parliament; of the doctrine of the Hereditary Right to the British Throne; of the Succession of our Sovereigns, and of the Royal Prerogative; in connection with which latter subject the excellent treatise of Mr. Allen should also be consulted. As introductory to Mercantile Law and the Law of Contracts, the fifty-second and fifty-third chapters of Mr. Warren's volume will prove very serviceable to the student, who of course cannot reasonably look for *many* details of decided cases illustrative of subjects so vast and comprehensive within the narrow limits here assigned to them. He will, however, find in those portions of this Abridgment which are devoted to a consideration of the leading departments of our Common Law, a few *well-selected* cases cited to support the propositions stated in the text, which should be diligently perused and studied in the Reports whence they have been culled. This work, we repeat then, cannot fail to be of much value to him who, being as yet ignorant of the nature of our Legal Institutions, and of the law which governs the community, would acquire some definite ideas respecting them, and would lay down for himself a solid foundation of knowledge upon which afterwards to build.

The plan of the work placed third on our list is this:—it treats, in the first book, of Legal Rights and Remedies; in the second book, of Contracts; in the third book, of Torts; in the fourth and last book, of Criminal Law. The plan of the first book gives the author an opportunity of describing the origin, history, and jurisdiction of the superior and inferior Common Law Courts, the nature of the rights enforceable therein, and the mode of procedure prescribed by the recent statutes of 1852 and 1854, and the new rules relating to Pleading and to Practice. In one of the chapters of this book, which is entitled "Of an Action at Law," after referring to the general rules of pleading, the author remarks as follows:—"In the Schedule (B) to the first Common Law Procedure Act are contained various forms of declarations adapted to circumstances of ordinary occurrence.

Whilst, however, it is enacted that these statutory precedents shall be sufficient, it is also provided, that 'the like forms may be used, with such modifications as may be necessary to meet the facts of the case,' and that nothing in the Act contained 'shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity.' Undoubtedly, therefore, *some* latitude is in every case to be allowed in framing the declaration; and this further appears from sect. 50, which enacts, that where issue is joined on demurrer, 'the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.' This provision, however, will not justify the pleader in indulging in inaccurate or verbose language. He must still take heed that he neither plead that which is mere matter of evidence, nor that of which the Court takes notice *ex officio*, nor that which would come more properly from the other side; nor should he allege circumstances which the law presumes, or which are necessarily implied; nor affect an excessive particularity, on the one hand, which is not essential to his case; nor allow, on the other hand, a statement to be made so vague and general in its terms as to give to his adversary information which is not sufficiently specific." Other faults of pleading, such as "departure" and "argumentativeness," are also briefly explained (p. 188).

With regard to the condition of pleading at the present day, some difference of opinion exists. We must of course assume that the learned pleaders—following all the rules and guarding against all the known faults of their art—can, if they are so minded, present their points of attack and defence comprehensibly, so that logical exactitude being duly observed, but the traps of technicality being cast aside, the advantage of expedition, cheapness, and certainty in the proceedings, may now at last be happily achieved. But somehow, we fancy that of late we have been hearing learned judges at *Nisi Prius* not unfrequently protest against certain specimens of pleading which have come

before them ; and we do imagine it has been said, on competent authority, that while, on the one hand, lengthy and antiquated forms are sometimes needlessly employed, on the other, a novel and unscientific laxity in language is often, by the present generation of pleaders, indulged in with impunity.

In the second book of these Commentaries, devoted to the Law of Contracts, we would draw attention more particularly to the chapter on the "Measure of Damages"—a subject which, although it has been in America very amply discussed by Mr. Sedgwick, has not, hitherto, received adequate notice from legal authors in our country. We lack space, however, for extracts from the chapter in question, and shall content ourselves with citing the author's concluding remarks upon the Law of Contracts.

"In taking leave of the subject of contracts, some brief concluding observations may not be deemed superfluous. The importance of a knowledge of the higher classes of contracts, and of the qualities which attach to judgments of our Courts of Record, or to instruments under seal, will, I apprehend, readily be conceded. And the necessity of having an acquaintance with the characteristics of simple contracts (to a consideration of which the foregoing pages have principally been devoted) will be at least equally obvious, when we reflect that mercantile engagements, almost without exception, belong to this, the lowest class of contracts ; that transactions such as these, ranging from the simplest to the most elaborate and important, depend often upon nothing more than the hastily written and peculiarly worded correspondence of trading firms, separated by either of the great oceans from each other : bearing this in mind, we shall perforce admit, that not merely to the professed lawyer, but to the layman, some considerable familiarity with the elements—with the principles—of our Law Merchant is essential. In the ordinary affairs of life, also, in the constantly recurring cycle of daily or familiar events, as well the most momentous as the most trivial compacts known to law are authenticated neither by seal nor by record. The purchase of necessaries in a shop, and the solemn contract of marriage, which is founded on the consent of the contracting parties—

evidenced *per verba de presenti*,—seem to be, in strictness, alike referable to the class of simple contracts.

“ In proportion, however, to its importance, is the difficulty of acquiring the knowledge here alluded to. Not only are causes of action *ex contractu* almost infinitely varied, but the matters of defence pleadable in such actions are equally diversified; whilst statutory provisions, relative to the one and to the other, are extremely numerous. Hence the learning applicable to contracts can but be acquired gradually—by experience—and practice. In connection with the lowest, as with the best-authenticated contract—with that which is oral as with that which is founded on record or on Act of Parliament (which latter has been designated as the highest kind of specialty),—points of perplexity and doubt will suggest themselves to the inquirer. The great principles, however, which support this entire subject, are, at all events, surely traced and ascertained; and the better they are understood, illustrated by a comparison of decided cases, tested and examined, the more will they be found consistent with common sense—with sound policy—with the dictates of wisdom and of justice.”

From that part of the work before us which is dedicated to the subject of “Torts” we transcribe some passages, which set forth clearly the classification adopted by the author. It is characterized by originality and simplicity, and if correct, must, we conceive, be worthy of perusal. We present it to our readers, with some necessary abbreviations, and with the omission of the references to cases cited.

“ A tort is described in statutory language as ‘a wrong, independent of contract.’ It involves the idea, if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal duty.

“ An action of *tort* will lie for a direct injury to the person or property, for the wrongful taking or conversion of goods, for consequential damage: the right of action for a tort being founded—1. On the invasion of some legal right; or 2. On the violation of some duty towards the public productive of damage to the plaintiff; or 3. On the infraction of some private duty or obligation productive likewise of damage to the complainant.

"The importance of having a correct perception of the nature of a right of action founded upon tort, or wrong independent of contract, will justify a brief examination of each of the three classes of cases above specified.

"First, then, as to the class of cases in which complaint is made of the invasion of some legal right (that is, of some legal right actually in the possession of the complainant, and to the enjoyment whereof he is exclusively entitled)—*ex. gr.* where wrong is done to the person or reputation—where goods are tortiously converted, or a direct injury is done to property. Here, a plaintiff, in order to entitle himself to damages, *may* be called upon to show two things—the existence of the right alleged, and its violation.

"Now, the existence of the right alleged will have to be established by reference to legal principles. It sometimes admits of easy proof, as in the case of an action of trespass for taking away goods," &c. * * * *

"But, further, the existence of a right may have to be proved by an appeal to elementary principles, and by deductions ingeniously drawn from them, by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the Legislature. In support of this remark, I would refer to the great case of *Ashby v. White*, formerly abstracted,—to the equally important judgment in *Semayne's case*, illustrating the fundamental maxim of our law, that 'every man's house is his castle,'—to the opinions of the judges, and the decision of the House of Lords, in *Jeffreys v. Boosey*, where the long-vexed question as to the existence of copyright at Common Law was re-agitated, and an opinion in the negative regarding it was expressed,—to all those numerous cases (some of which will have to be hereafter noticed) wherein the existence of a right has been found to depend upon the interpretation of the Statute Law, and the unravelling of its perplexities.

"In the class of cases now under consideration, it will be noticed that proof of actual damage has not been specified as requisite to entitle a complainant to recover. Many instances confirmatory of this remark—that an action may lie for the

invasion of a right without proof of special damage—were cited in a former chapter; where, *inter alia*, reference was made to various decisions which establish that the fraudulent use and appropriation of a trade-mark is, *per se*, actionable. To what was then said upon this part of the subject, I would add, that, in close analogy to the principle just stated, it has been decided in the United States, that a coach-proprietor running carriages between a railway-station and a town has no right falsely to hold himself out as being in the employment or under the patronage of a particular hotel-keeper in such town, by affixing to his carriages, &c., the name of the hotel, this being done to the detriment of some other party lawfully entitled to the privilege in question. And, in the case just cited, it was further held, that the representation thus falsely made for the purpose of enticing passengers from the plaintiff's carriages, would be a fraud on him, and a violation of his rights, for which an action would lie *without proof of actual or specific damage*.

“Secondly. An action *ex delicto* may be founded on the violation of some public duty (*i. e.* of some duty towards the public), and consequent damage to the complainant. Now, here three different matters must be proved in order to entitle the plaintiff to a verdict; viz., the existence of the alleged duty, its breach, and damage: the first of which items, viz., the existence of the public duty, must be shown, either by bringing the facts of the case within the reach and control of some acknowledged doctrine of the common law, or by showing that they are within the words, spirit, or purview of an Act of Parliament.

“Let us, under the term ‘public duty,’ include the duty of refraining from doing, as well as that of doing, acts of a particular kind or tendency, and we may then lay down the proposition above stated, thus, in a somewhat expanded form,—Wherever a duty has to be observed towards the public by an individual, and another is specially injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at suit of the latter party against the former.

"As simple illustrations of the practical working of this proposition, I may at once refer to the cases below cited, which establish, that wherever an instrument, dangerous in its existing state, and calculated to inflict damage on those who may come in contact with it, is so placed as to be likely to cause injury, the person thus placing it is liable, if injury ensues, to the party injured.

"Let us pause here for a moment to notice one characteristic of the class of cases now under review. The breach of a public duty causing damage to an individual, in truth, combines two tortious ingredients, which are, according to circumstances, more or less clearly distinguishable from each other,—the wrong done to the public, and the wrong done to the individual. That which is, in strictness, correlative to a public duty, is a right enforceable at suit of the public. But, then, the general rule of law is well settled, that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. Where they suffer wrong or sustain damage *in common with other members of the community*, no personal right of action thence accrues. The private grievance is merged in that of the public, and the remedy (if any exists) will be by public prosecution, in order that the rights of the public may thus be vindicated. Even where one person sustains an injury in common with the public, and, from the circumstances in which he happens to be placed, suffers more frequently or more severely than others, he will not, on that account, have, as of course, a separate right of action. It is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him."

After this disquisition, the commentator proceeds to analyze and discuss some important modern cases on the subject before him; for instance, *Ellis v. The Sheffield Gas Consumers Company* (2 E. & B. 767), *Brown v. Mallett* (5 C. B. 599), *Couling v. Cox* (6 C. B. 703), and thus proceeds:—

"We may now, I think, conclude that a statutory duty towards the public may consist either in doing or in abstaining from doing some particular act,—that 'if the law casts any duty upon

a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures,'—that the non-performance of a legal obligation of this kind will not be actionable without special damage,—and further, that 'where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is, that the party so injured shall have an action:' this last proposition being however subject to an important qualification, viz. 'that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute,' or, as remarked in *Doe d. Bishop of Rochester v. Bridges*, 'where an Act creates an obligation, and enforces the performance in a specified manner,' it holds generally true 'that performance cannot be enforced in any other manner.'

"Thirdly, a right of action *ex delicto* may be founded on the infraction of some private compact, or of some private duty or obligation, and consequential damage to the complainant.

"Any duty, moreover, must in strictness be deemed 'private,' which is to be observed, not towards the community at large, but in relation to one or more of its members. The class of private duties is consequently extremely large,—it comprehends duties flowing from contract express or implied, from bailment, from the relation of master and servant, or of landlord and tenant, from the occupancy of land, &c.: as throwing some light upon the nature of such duties, the authorities *infra* may be consulted.

"Now, in any case referable to this class, the plaintiff must, in order to sustain his action, be able to prove some kind of contract or obligation out of which the specific duty, with a breach whereof the defendant is charged, will flow in legal contemplation, or he must adduce evidence of facts establishing such a relation between the defendant and himself, that such specific duty will thence result. Further than this, he must, of course, show a breach of the duty thus raised, and consequential damage to himself.

"A private as well as a public duty may exist by virtue of the statute or of the common law. Thus, it has been held that case will lie against a railway company for acts of wrongful omission of their statutory duty in regard to the transfer of shares, and for wrongfully declaring the same forfeited and selling them. 'The declaration,' said Lord Campbell, C.J., 'shows both *injuria* and *damnum*. The defendants have been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring the shares to be forfeited, and in confirming that forfeiture. It is said that the plaintiff could sustain no injury; but he has been deprived of the ordinary privileges of shareholders, and contingently of any profits that might have arisen upon the shares. Those are clearly injuries, for which he has a right to bring an action.'

"Again, a private duty may exist at common law, for breach whereof, coupled with consequential damage, an action will be sustainable."

Several important classes of cases are then brought under notice as belonging to the last of the divisions above particularized; viz., where a tort flows from the breach of a contract,—where there is a breach of a duty undertaken for the service of another,—where a right of action is founded on fraud, deceit, or misrepresentation, whence ensues consequential damage; and, finally, where the right of action is founded on the malicious doing of an act also productive of consequential damage.

"A general survey of the various causes of action founded upon tort,—a minute examination of precedents, of declarations, and other pleadings available in such cases, will show that in most of them no difficulty can be felt in at once assigning to its proper class the right of action *ex delicto*, originating out of given facts."

After a few additional remarks upon the actions of trover, libel, and those founded on injuries done to the wife, child, and servant, with reference to the classification of torts, previously expounded, which we need not quote, the author thus concludes his chapter:—

"Having thus sufficiently investigated the nature of and ingredients in a right of action *ex delicto*, I shall in the ensuing chapters proceed to speak—1st, of Torts to the Person and Reputation; 2ndly, of Torts to Property, whether Real or Personal; 3rdly, of Torts not directly affecting the Person, Reputation, or Property.

"Besides the convenience of the arrangement just suggested for an elementary treatise, there is, to some extent, authority for its adoption; for instance, Sir Henry Finch tells us, that our law regards the person above his possessions,—life and liberty most,—freehold and inheritance above chattels,—and chattels real above personal."

But we cannot afford space to pursue the thread of subsequent chapters, and must now bring both our quotations and remarks to a close.

P. F.

ART. X.—STATUTE LAW COMMISSION.

OFFICER OR BOARD FOR REVISION OF BILLS.

1. *Report of the Statute Law Commission.*
2. *Suggestive Letters on the subject of Statutory Reform, addressed to the Hon. P. J. Locke King, M.P.* By EARNEST JUNIOR. (Privately Printed.)
3. *Ruins of Time, exemplified in Sir Matthew Hale's History of the Pleas of the Crown.* By ANDREW AMOS, Downing Professor of the Laws of England in the University of Cambridge, and late Member of the Supreme Council of India.

THE Statute Law Commission has made a supplemental report, containing two excellent but limited plans, sanctioned by the signatures of twenty lawyers, occupying the most eminent legal positions in the country. The first plan is the appointment of an officer or a Board to revise and improve

the current legislation. The second, the adaptation of a system of classification to the public general statutes.

We cannot admit the correctness of the designation given to the first of these recommendations; it has not the distinctness and explicitness of a plan, but is rather a general suggestion, without form, and void.

But to do justice to the plan, we will quote it in terms.

“ We therefore beg leave to submit to your Majesty, that in our opinion the most effectual method for insuring simplicity and uniformity in, or otherwise improving the form and style of future statutes, would be the appointment of an officer or Board, with a sufficient staff of assistants, whose duty it should be:—To advise on the legal effect of every Bill which either House of Parliament should think fit to refer to them, and, in particular, on the existing state of the law affected by the proposed Bill, its language and structure, and its operation on the existing law; and also to point out what statutes it repeals, alters, or modifies, and whether any statutes or clauses of statutes on the same subject-matter are left unrepealed or conflicting; so that the House may have at its command the materials which will enable it to deal properly with the Bill.

“The only material objection which has occurred to us as likely to be made to such a scheme as that above proposed, is the danger of making the authority of the Legislature, to some extent, subordinate to that of such a Board or officer. It does not, however, appear to us that there is much weight in this objection; the officer or Board would be a servant, not a master, as we do not contemplate that such officer or Board should report on the policy or expediency of any proposed measure. The powers of both Houses, and of all members of each House, would remain inviolate. But assistance would be provided for them, as well in advising on the effect of the Bills at the time of their introduction, as in watching them during their progress through Parliament, and keeping them in harmony with the whole law. The labour and anxiety of all members of Parliament would thus be materially relieved, and the legislation of the country improved. A great saving of time would also be effected; for discussions which now arise, and amendments

which it is now necessary to introduce in the various stages of the Bill, would often be avoided.

"We have used the terms 'Officer or Board,' because our plan no doubt admits of being worked by either means; but we are of opinion that a single responsible person, with adequate assistance, would be preferable to a Board, for carrying into effect a work of this kind. Perhaps there are few cases in which delay and uncertainty of action are not caused by the divided responsibility, and sometimes divided opinions, of a Board; but in a case like the present, requiring the invention, or at least the practical application, of a new mode of procedure, the exercise of much discretion, and the power of rapid decision and action, it would seem that anything like concurrent authority would be inconvenient, and that a single responsible head, with a well-organized staff of assistants, would work better. We think it would be convenient that the proposed officer should be the same for both Houses."

Many questions arise on the perusal of this project. It is proposed to have an officer or Board, with a sufficient staff of assistants, without any statutory or other rule of action, or instruction for their guidance. Is the Board or officer to act upon his own views, or the views of Parliament? To whom will the House trust this guideless power? Who is the man whose learning, whose experience, whose skill, whose impartiality, whose temper and judicious conduct, qualify him for the task? We remember how jealous the House was of the reports of the Railway Committee of the Board of Trade; and that the Standing Orders, the compliance with which has been wisely intrusted to the supervision of two officers,—the Examiners of Standing Orders, and of the Committee on Standing Orders,—are the fruit of many years' experience, constantly directed to the improvement of these by-laws, to the observance of which the House itself has been trained by long practice.

Many years ago, the author of the "*Mechanics of Law-making*" pointed out the difficulties of the case, and recommended that such an office should be composed of several practical officers, acting upon previously-assigned directions and constructions; and it is obvious, that unless the office is to be

of a most arbitrary character, and put in constant collision with the two Houses, or with members, either that expedient, or a body of Standing Orders or Instructions, must be a preliminary to its action.

Moreover, the office should be well organized. It should not consist of one person, but of several.

The suggestions on these heads in this work will assist in recalling the considerations that ought to be regarded.

Extract from "*Mechanics of Law-making*," pp. 162, 163, 164:—

"The duty of verbal revision might be executed by a single officer, with able assistants, who should be skilled in the different works of Judicature and the Law, while from the executive department would be provided the aid of the usual law advisers.

"With the help of a General Statute of Directions and Constructions [or a body of Instructions, or Standing Orders], the Law would speedily acquire an uniformity of expression.

"It is obvious that the Revising Officer should be selected for his skill in verbal expression. It is not meant that he should have an absolute control over the language of our legislation. His duty might be confined to pointing out departures from the provisions of the Statute of Directions and Constructions, and suggesting words more apt for the purpose.

"No Bill should be presented for a second reading without being reported upon by such officer, nor read a third time without a repetition of the same proceeding. The skill which such an officer must by constant practice acquire would enable him to peruse and report upon four or five Bills in a day; and the labour would every year grow less and less, as all whose task it would be to prepare Bills would, to spare delay or expense, take care to have them properly drawn in the first instance.

"The principal officer should read all laws. The duties of the assistants in the departments would be confined to pointing out any inaptitudes of expression for their peculiar subject-matters, and the omission of any necessary provisions.

"It would be necessary that the verbal revision should be performed by one man (under such advice and assistance), that he might draw the language of all statutes to the same uniformity of expression; and this is said with the full conviction that the other points of the Law—its materials—must be furnished and digested by other persons whose qualifications are more peculiarly fitted for that duty. There should be more than one,—not a mere lawyer, nor a mere philosopher, nor a mere draftsman, nor a mere official man,—but all of them should be conjoined for the varied function. Nothing can be worse conceived for such a purpose than a Commission of all lawyers, especially practising lawyers in a single department of their profession. But again, whatever may be the component parts of the body who shall digest the Law, there should be but one reviser of its form and its terms, and he should be skilled, not in the drawing of Money Bills, or Official Bills, or Justice of the Peace Bills, or Irish Bills, each after the fashion of its kind, but in all the forms of Statute Law; and therefore, because the energies of one man could not accomplish more, and it is necessary to obtain the highest skill in this direction, his task should be confined to revision alone."

Extracts from "Mechanics of Law-making," pp. 337, 368, 373:—

"It were vain to expect a complete reform of our Statute Law without the aid of some general scheme of operation, by which the uniformity of expression and structure may be secured, and without the concurrence of the Courts of Judicature.

"Neither of these objects can be [entirely] obtained except by the intervention of a legislative enactment, affording directions for the framing of our laws, and laying down rules for the guidance of the Courts in the construction of them."

* * * * *

"I.—AS TO THE OFFICERS BY WHOM [THE WORK MIGHT]
BE CARRIED INTO EFFECT.

"1. *Verbal Reviser*.—To peruse every Act before it is presented to the Legislature, and between its several stages in its

progress there, in order to preserve an uniformity and propriety of expression.

" 2. *Clerk of Repeals*.—To classify an index of all statutes heretofore or in future passed; to note such as are repealed wholly or partially.

" 3. *Maker of Indexes*.—To watch all the forms of all the statutes passed, to note all peculiar provisions and record them, and to revise the indexes to each Act; to arrange the indexes of each class of Acts, and to make the general index.

" 4. *Reporter*.—To record all decisions of the Courts on ambiguities of the statutes, to arrange such decisions according to the nature of the subject, and to note that in all future legislation regard be had to the prevention of such doubts.

" 5. *Clerk of the Papers*.—To receive all papers left at the office, to note the time of the same being left, and of their transmission from one office to another.

" 6. *Comptroller of the whole Department*.—To superintend the operations of the office, and where one branch is overburthened, to call in the aid of the officer who is at leisure, or engaged in work that may be postponed without detriment to the public service, especially during the sitting of Parliament.

" Each of the officers should have one or two assistants, that their employment might suffer no interruption from the illness of the principal.

" II.—AS TO THEIR PROCEEDINGS.

" These are more or less indicated in describing the duties of the respective officers. As the movements of the Legislature would in some degree depend on the regularity and despatch of this office, it would be necessary that an active superintendence should be instituted. The registry of the Clerk of the Papers would serve for this purpose, and it would also be some protection to the officers of this department against the caprice, the dilatoriness, or the impatience of others. Nor is superintendence sufficient without the means of removing impediments as fast as they arise. This would be the Comptroller's task. When business is to be transacted with great rapidity and regularity, it is of importance, and this more particularly

where the occupation is mental, that the attention of the officer should not be devoted to many points. It is therefore proposed that there should be several officers with their peculiar functions; yet the occasional employment of these officers in the functions of the other branches would quicken their attention to the bearing of the subject-points of such other branches upon their own. It would also prevent them from sinking into mere routine machines,—the too frequent mischief of official employment,—which makes them slow to apprehend in what improvements may be serviceably afforded. As the duties of the different branches of the office are so nearly dependent, all the officers of the department, with the Comptroller for their chief, might form a council as to any points of difficulty.

“The appointment of these officers should not be in the Crown, but in the Legislature. Their functions would be of high responsibility. Occasions might arise in which they would come into collision with members of the Executive, who must often prevail if they had the power of dismissal. It is not proposed that these officers should be legislative or judicial, but ministerial.

“Whether the House of Commons should or should not constitute standing committees of its own body for the investigation and audit of different branches of State affairs, an office constructed as the one proposed would be necessary in order to preserve the wholeness of the law.

“ III.—THE FORM OF THE LAW.

“For this purpose also a general form of law must be prescribed. Each law should be cast into a general mould, for the reasons that have been detailed in touching upon the several parts of an Act. It should consist of a short title, a full title, an analysis, the expression of enactment, the body of the Act, with its appropriate clauses, provisos, and exceptions, and of schedules for all necessary matters, and an index.

“The arrangements should be a matter of special attention. It should be divided into leading heads, under which should be classed all subordinate matters. If the matters be of regulation to be observed at certain seasons, they should be treated

chronologically in the order of time; indeed, wherever the events contemplated follow in succession, that succession should be regarded; but where the matters are altogether miscellaneous, each should be put with its kind, and distinctly separated.

"Where the law is of the nature of a codicil, or supplemental to another law, it should follow the nature and order of that law.

"It is unnecessary to dwell upon these and kindred points, as they have been treated at sufficient length elsewhere. It is sufficient to notice their relation to the subject of this part of the work.

"IV.—AS TO THE RULES OF CONSTRUCTION.

"It is not necessary to recount here all the Rules of Construction, nor would many be necessary if the form and language of our laws ceased to be anomalous. Yet under the best system some would be required, and these might be framed out of the suggestions cast up and down this book. A glossary of terms should, however, form a part of the work, so that it should no longer be necessary for every considerable statute to carry with it its own dictionary."

But does the question lie between an Office or a Board,—ought it not to be an Office and a Board? An Office to execute in a responsible manner certain subsidiary, mechanical, and ministerial duties; and a Board to decide on questions of principle and to prescribe instructions.

Again, is it expedient that the whole duty of preparing Acts of Parliament should be placed in one man's hands? Would it not be better that the legal assistants of the official departments should perform the task under the direction, superintendence, and control of the office, as to matters of form, structure, and language? If it were possible for one man to execute this task, would it be fit that it should be assigned to one man? Would such a popedom be endured in a country which denies infallibility to all and each?

We beg to add another plan, submitted to the Government in 1840 and again in 1847, just before Mr. Coulson was appointed Parliamentary Counsel to the Home Department.

"Memorandum relative to the preparation and revision of Legislative Measures, especially with reference to the means of obviating or mitigating the failures to which at present they are subject.

"The following extension of existing arrangements would meet the difficulties to a full extent, and admit of development or of abatement as the service should require. For an entire conquest of the difficulties, the whole scheme is necessary; but the adoption of parts would be attended by proportionate advantage.

"I.—Legal Advisers or Assistants of the Departments.

"II.—Registration and Examination of Bills and Statutes, by Indexes and by Registers.

"III.—Board or Office of Revision or Reference.

"IV.—Committee of Privy Council for matters of Law and Legislation.

"The legal assistants might draw the Bills; the persons appointed to register the statutes might index them; or if indexed by the draftsman, or under his inspection, might abstract in a general index, under general heads, the particulars of the index of each Bill. Points of defect in technical detail, and discrepancies thus discovered, might be referred to the Board of Reference. Matters of constitutional policy, and the higher purposes, should be considered by the Committee of Privy Council, who might refer to the Board of Revision any matters for which they desired the opinion of the officers composing it.

"The Attorney and Solicitor-General, whether members of the Committee of Privy Council or not, should have all Bills referred to them as a matter of course; not as to the whole detail, but as to matters of importance in point of policy, or as to matters of importance in point of technical detail.

"To almost every department there is attached some legal officer, either in an official capacity, or as counsel; all departments occasionally employ legal assistance, and the law officers of the Crown are assisted by other counsel.

"The memorandum 1840-1 as to Indexes will give a notion of the mode of operation by that means (see paper marked B).

"The evidence taken before the Committee of 1836 suggests the constitution of the Board of Reference or Revision,—common lawyer and pleader, equity draftsman and conveyancer, layman (conversant with parliamentary practice).

"The memorandum (of 1840) relative to the Committee of Privy Council will give a general idea of the constitution and working of that body (see paper marked A).

"We have to consider how invariably all measures now fail, more or less,—the enormous expense which attends the present arrangements,—the discredit which each Government in succession obtains by continual failure.

"We have also to consider the multifarious work incident to the preparation of laws, and the total impossibility of one or a few men executing that work; and that by employing the persons now employed in a regular and organized manner, the work may be done, at no greater expense, with more efficiency and with more credit.

"The work involves,—

"(1.) The collation of former Acts on the same subject, or at least the comparison of the proposed provisions with those of former Acts, and with decisions of Courts, and with former Bills, and with former parliamentary proceedings.

"(2.) The drafting provisions.

"(3.) Indexing the Bills.

"(4.) Preparing outlines or analyses.

"(5.) Adjusting course of proceeding to analogous proceedings.

"(6.) The preparation of forms.

"(7.) The careful collation of interpreted words, and comparison of phrases throughout the law.

"(8.) The recording of objections, or defects, or miscarriages.

"(9.) The final revision of the draft.

"(10.) Communication with persons concerned.

"The whole process of inquiry, as well as of making the law itself, would be much assisted by the merely methodical disposal of the above matters, especially if competent persons

were employed specifically on different ranges of technical subjects, which in practice do not come under the cognizance of the same practitioners, who, though they bring great skill to the work in some directions, usually fail in others with which they are not familiar. But the mastery of the difficulties depends, it appears to me, upon due provision for the execution of the details. The learning and intelligence at present employed upon the work are adequate, but they fail of producing their full effect, from not being fortified by appropriate inferior—not to say mechanical—aid, properly organized and trained. The mechanical aid exists, and is employed wastefully; for the copiers, the index-makers, and the printers, who are employed in great numbers, do not afford to the law-draftsmen the assistance which is usually the result of constant employment in a regular manner upon one or two set divisions of a work, in immediate subordination to superior intelligence.

“I propose, then, that an officer should be charged with organizing and superintending a staff of inferior persons, now employed [in the capacity of clerks, index-makers, and printers,] allotting to them divisions of duty, so that the work may be done simultaneously, and be reduced, as far as may be, to routine.

“That the legal assistants of the department should be instructed to avail themselves of the services of such persons, and that, having prepared the Bill as nearly as may be according to the forms which may be most approved, the whole should be examined by the operation of indexing, and the points of discrepancy thereby elicited submitted to the Board of officers charged with the general revision.

“The officers composing the Board should be individually charged with specific duties, and yet, from time to time, act together as a Board for the consideration of common objects; so that time may not be lost in the intercourse, and a common understanding may be come to on those objects.

“To give in detail (even if it were possible) the means by which such a work could be accomplished, would overlay the question, and withdraw attention from the main purpose. A standing body, appointed to watch and direct the operation,

would adopt the obvious course of ascertaining what expedients have been adopted or suggested, and, selecting out of the abundant materials already collected, or which by means of a record of defects and miscarriages would be hereafter collected, such as are found to be most acceptable, introduce and sanction their general application.

* * * * *

“The plan supersedes nobody,—is consistent with every plan in force, and in vogue; and will, in fact, give efficiency to everybody now engaged in the task.

“A.”

“MEMORANDUM—(*Communicated in 1840*).

“Measures of purely law reform, or chiefly of a technical character, and measures of a general nature not falling within any department, have, though completed, or nearly so, by the professional persons, been postponed, from the difficulty of finding public men sufficiently conversant with the matter of such measures, or sufficiently disengaged to consider them in the first instance, and to conduct them through Parliament afterwards.

“To obviate this, the late Mr. Tyrrell, the eminent conveyancer, in his examination last year (1839) before the Committee of the House of Commons on private business, recommended the appointment of a Commission, consisting of members of both Houses of Parliament, with three or four lawyers; so that after the lawyers should have completed their labours, under the direction and superintendence of the other members of the Commission, there should be at hand, in the latter, a number of public men who had thus become acquainted (if not previously so) with the subjects, and prepared to propose and defend in Parliament the measures which should be recommended.

“But Commissions are now odious, and are not fit instruments for the transaction of a species of business which must always, more or less, constantly demand attention.

“I take the liberty to suggest, as the more constitutional

and more convenient plan, the appointment of a Committee of the Privy Council 'for the consideration of matters of law, and the administration of justice,' to which might be referred the consideration of all Government measures of a general nature, not belonging to any department of the State, and such others as the different departments of State should think proper to refer, in regard to their technical requisites in a legal or legislative view.

"It is of the very nature of the Privy Council to advise the Executive; and we have already examples of the adaptation of the existing institution to a new want, in the Judicial Committee, and the Committee on Education.

"The Committee might be composed of the Lord President, the Lord Chancellor, the Lord Privy Seal, the Secretaries of State, all heads of departments who are of the Privy Council, and *nominatim* of lawyers members of the Privy Council, who are also members of either House of Parliament, and of course supporters of the Government.

"A Committee so composed would at present give the services of Sir George Grey, Mr. Macaulay, and Mr. Sheil in the Lower House, and of Lord Langdale in the Upper House; in addition to a sufficient number of lay peers and commoners.

"By this arrangement, the members of the Government would be brought together to consider matters of a legal technical nature, in which they would have a common concern, without depriving any of the power and patronage which belongs to the execution of their own branch of affairs.

"The members of the Committee need not all meet in form, any more than the Board of Trade meets; but by right of their membership they would be communicated with, as the Secretaries of State and the Chancellor of the Exchequer are in regard to matters which concern their department; while the practice of referring to one office for this species of information would afford facilities to the department in their legislative labours, and at the same time protect the Government generally from those smaller imperfections in no way connected with policy, which are often made the means of discrediting the better parts of measures of excellent purpose.

"A very small staff would be sufficient, since the Committee would be more or less assisted in the preparation and revision of such measures, or parts of measures, as should fall to their lot, in the first instance by the law advisers of the different departments, and other official bodies, and by the Law Commissioners, in regard to matters intrusted to them; and, finally, by the law officers of the Crown, who should be habitually referred to in regard to measures in their complete state.

"It would, in fact, be advisable to engage all the above persons occasionally in the work, according to their respective functions, as well for the sake of securing the greatest amount of experienced and responsible service, as for bringing them into a common practice, so far as that is attainable or desirable.

"Such a body as this Committee would probably be the best fitted to consider the Digest of Criminal Law now in the course of preparation by the Law Commissioners, and from time to time to propound and defend it in Parliament. Some measures must needs be taken soon to meet this obvious claim upon the attention of the Government, which is already liable (however undeservedly) to the charge of neglect on this score.

"By bringing the lawyers of all departments into communication, and by occasional suggestion, this office would gradually introduce those improvements in law-writing which experience should point out, and which should be found to be acceptable to competent judges of such matters.

"In the meanwhile, the Acts of Parliament might be systematically indexed under its direction, for its own use, as well as for that of the respective departments, and of the public, to which the several portions would relate.

"It would naturally collect the parliamentary and other works which have been published upon the subjects referred to its jurisdiction.

"It might collect the statistics of the administration of justice, of which there is a great abundance in the parliamentary returns and reports, but which, from their scattered and defective state, are at present of very little value.

"And it might perform any other duties of a kindred

nature which are not otherwise provided for, though of essential service in practical legislation.

Note.—The present is an example of the necessity and utility of such a standing body for the consideration of such matters. To say nothing of previous efforts, this matter has been directly before the public since 1835. In 1836, it was the subject of inquiry before a Committee of the House of Commons. In 1838, elaborate papers, written with a view to induce a congress of draftsmen, and definite measures, were laid before Parliament. In 1839, the subject came again before a Committee of the House of Commons on private business. And on numberless occasions, when, justly or unjustly, Governments have been assailed for their measures, the topic has been repeated.

“ B.”

“ MEMORANDUM—(*Communicated in 1840-1841*).

“ I.—*Classed Index of the Statutes.*

“To exhibit the general state of the Statute Law in each department of affairs, and to afford the basis of a record of the successive repeals and alterations of the Statute Law.

“ II.—*Index of Persons affected by Statutes.*

“To intimate to official and to private persons those statutory provisions, of the relation of which to them no intimation is given in the titles, or in the general object of the statutes in which such provisions are to be found.

“ III.—*Index of Legislative Matters.*

“To afford to the Legislature and to the professional draftsman the ready means of knowing what legislative appliances have been used in other cases of the same kind, in order to enable them to select the most proper constituent parts of a law, and to avoid those inconsistencies and contradictions which are to be found, not only in the Statute Law generally, but even in the statutes of the same session.”

"These indexes will collectively form one ; and though aiming chiefly at different objects, they will assist each other.

"To give to them the greatest practical value, both for purposes of reference and for facilitating an adherence in the legislation of each department to the same uniform practice, each index should be arranged with reference to the departments of State and to private persons, so far as they are respectively concerned.

"Thus the portions of the several indexes which relate to each official department, and to each private person, may for the use of such department or person be separated from the other portions of the same index, and form a distinct one, showing at once the relation of any matter to the system of that department and to the general law.

"The general plan might be carried into effect in the following manner:—

"The classed index of statutes to be extended at once to all the statutes in force.

"The other indexes (personal and legislative) in the first instance, to be extended either to a body of law or to the statutes of a single session, perhaps to both, and afterwards gradually to the other branches of law, as the occasions of the Legislature or of the public department shall require.

"In executing this work, regard should be had to such modifications and arrangements as will admit of a regular and punctual continuance of the indexes, as well as during the session of Parliament with respect to pending Bills, as at its close with respect to laws which shall have passed the Legislature.

"So that if any system of revision should be hereafter established, these indexes may render to the person charged with that duty, every practicable facility which such a machinery is calculated to afford.

"So that, also, from time to time the additions and changes in the law may be recorded, without destroying the general arrangement of other parts.

"And so that if any systematic plan of recording and digesting the decisions of the Courts of Justice should be adopted, the statutory provisions and the decisions of the Courts may,

without inconvenience, be so incorporated together as to present a sufficient indication of the operation of the one upon the other, without confounding the two species of legal authority.

"In accordance with these views, the Queen's printer might be instructed to prepare the indexes in question.

"This arrangement, so far as the Queen's printer is concerned, is recommended by the circumstances that that officer has already in his employment persons accustomed to prepare indexes, and that by virtue of his office he is the proper person to whom the execution of the details of such work should be intrusted.

"But inasmuch as in the preparation of such indexes much useful matter would be collected which it might be inexpedient to publish on account of the expense, and with regard to the information to which that objection would be inapplicable, there might be occasion to refer to the indexes before they could be published, the work ought to be conducted in the neighbourhood of the principal public offices at Whitehall and of the Houses of Parliament, in order to furnish to the fullest practicable extent the means and opportunity of referring to the information upon the Statute Law, of which such an office would become the depository.

"With respect to the publication of these indexes from time to time, a supplement should be printed shortly after the close of each session, unless the alterations with regard to any portion of the indexes should be of such magnitude as to render it advisable to republish such portion.

"Former indexes have failed, from not being regularly continued, as well as from not being complete and well adapted to their purposes. To obviate this, and the necessity of from time to time making good the lost ground, as well as the inconvenience occasioned by the want of such indispensable facilities, the suggestion just adverted to appears to offer the best practical expedient."

We have given in full these plans, because, at this epoch of the question, the *desiderata* are the means whereby the general suggestions may be realized,—How, if we have a Minister of

Justice, or proceed upon our present footing, the work in detail is to be done. We have wasted much time and much treasure, from our ignorance of the means of working our detail, and of the means of bringing together all the special, official, literary, and mechanical abilities which are necessary for the task. The very elements of the subject are to be learnt, and the men who have devoted themselves to this much-neglected sphere of the subject, have been, by some mysterious causes and influences, systematically shut out from giving their aid in the right manner and at the right time, upon any terms, gratuitous or remunerative.

It is clear that we do not want so much a new department as new life and energy in old ones. The Lord Chancellor has his part to play; the law officers of the Crown theirs; the Clerk of the Parliaments and the officers of the two Houses theirs; the members of the two Houses theirs; and the Queen's printers theirs. If we were to remove from each of these functionaries the hinderances to which they are subject, and supply the facilities which they need,—among which latter would be an outfit of the Statute Law in its present state, so far as it affects them or the concerns under their cognizance, properly arranged and indexed,—the whole body politic could be revived in this matter, and capable of performing its functions without difficulty, and even with pleasure.

It is sheer vulgar pretension of statesmanship to make a new agency for every state of grievance, and by relieving the existing agencies of their proper vocation, to augment their deficiencies and their incapacities.

Let us collect the suggestions and examples so profusely scattered over the Statute Books and the papers and reports on this subject, and propound in detail a plan, which shall specify, in the practical shape of instructions or orders, every point to be regarded; and also exemplify the instructions by a selection of Bills, or parts of Bills, of the most approved kinds.

Let the draftsmen, and others who are experienced in this matter, state how far they agree or differ, and if so, why so.

With this code of instructions, the Houses of Parliament, the members, and the draftsmen, would be enabled to frame the

Bills or embryo statutes in a regular manner; and being possessed of standard rules, could with propriety confide to an officer or Board the examination of the Bills as to their compliance with those standard rules.

But it will never be endured, that behind the back of the draftsman such reports should be made as that appended to the first report of the Statute Law Commission, in reference to Mr. Locke King's Personal Estates Bill, which had literally been written on its plan, in obedience to the direction of a law officer of the Crown and a Statute Law Commissioner, who had prescribed that the Bill should follow as closely as possible the terms of the existing law, which had been the subject of so many judicial decisions.

The officer who should report on the Bill, and the officer or draftsman who should draw the Bill, ought to be enabled to refer any differences to an accessible officer or Board in friendly suit: at least, as in the case of the Committee on Standing Orders, there must needs be a tribunal for this purpose.

But no Bill should be presented till the law on the subject of it had been ascertained by the production of the statutes and parts of statutes relating to it, and perhaps consolidated; and to that end measures should be taken to collect not only the scattered contents of the existing statute law, but the annual accretions of statute law accumulating session by session.

Upon this head the following proposals have been made to the Statute Law Commission, but without success; nor can opportunity for explanation be obtained. It would seem that the door is shut upon suggestion, although it fall within the scope and is the very object of the Commission.

Note of Proposals.

"I.—To prepare a register of statutes (Bills and legislative matters), consisting of collections of statutes and parts of statutes, &c., bearing on each subject-matter, abstracted, extracted, indexed, and arranged, according to subjects, ready for the use of the draftsman, the administrator, and Parliament, with the instructions, forms, and examples needful for each class of work in the consolidation, or preparation, or amendment of the Law.

" II.—To be prepared to return to Parliament on the occasion of the introduction of any Bill, a statement of the Acts and parts of Acts applicable to the matter in hand, together with the decisions thereon.

" III.—To organize a moderate office for the transaction of this business.

" IV.—To train a corps of assistants and clerks to the execution of it with accuracy, regularity, and despatch."

There is too much reason to believe that the Commission is constituted upon a plan that renders the performance of its duty impossible. Its sittings are at too distant periods; many of its members never attend; its proceedings are not ordered according to any plan, and are secret as regards Parliament and the public; and as regards its members, the greater part of its proceedings are practically unknown to the majority of them; important papers and communications not being read or circulated, and perhaps intimated by the barest minute, or note in the minutes of its proceedings.

Moreover, the Commission is too exclusively legal in its character, and pretty nearly of the same range of legality; it wants statesmanship,—it wants practical skill and minute experience, as well as an impressibility to wider influences. It is not sufficiently special, or official, or literary, or mechanical in its composition; its elder authorities are too predominant in one sense, and too subordinate in another; it is too entirely in the hands of Mr. Bellenden Ker. Let the qualifications and experience of any one in this peculiar field be what it may, it is to be feared that if he be personally unacceptable to Mr. Ker, he will be rejected, and not even listened to.

It is clear that the Commission can never acquire weight under these circumstances; and some arrangements should be made to secure not only action but inquiry, and inquiry in a formal responsible manner. Such a matter should be informed by the experience of many minds, and aided by many kinds of skill; and men, not of note, who have devoted themselves to this peculiar subject, should be welcomed and encouraged, and not repelled.

How is it that matters have remained so long in their present state? To whom is the fault attributable? How shall we

emerge from our difficulties, and take the field in practical effective action? Let by-gones be by-gones, and let us consider the last question, putting aside the others, or touching upon them for our guidance in repentant effort to do the right thing at last. It is sad to think that every interest should be perilled by a persistence in a course which no one commends, simply, as we believe, to gratify the obstinacy and the pride of one man, and not to be beholden for advice and suggestion to men of inferior positions. All this has arisen from neglecting the principle which obtains in councils—to let the youngest speak first, and the elders profit by their juniors' more active suggestion, in giving their own maturer judgment.

In the series of articles which have appeared on the subject, we have shown the part which the Legislature might take in the matter, how the Statute Law Commission might assist, with the help of the officers of both Houses of Parliament, of the law officers of the department, of the Judiciary, of the profession of Law, and of the officers of State, chief and subordinate. We propose to show how, on the one hand, the Sovereign and the people, and their representatives individually, might take their part, generating motive and energy, and stimulating by approbation and reward.

It is a nation's work, to be effectuated by a nation's will and energies.

The press, too, might lend its help. This it has done occasionally, but with too little frequency and pertinacity; the Administrative Reformers pass by the subject as if it were not of the very essence of their matter; and men of business are apt to regard it as a casualty, which may perchance affect them some time or other, and not as a species of dry-rot, penetrating every part of society, of whatever kind.

At all events, it is not come to be considered as a practical measure, in its means as well as its objects.

Her Majesty has done much, with the silent and sure influence of womanhood, to produce good in almost every direction. Her sage adviser Lord Melbourne had her instructed well in constitutional learning by Mr. Amos, and the royal children, we believe, receive like instruction from able teachers. Would

that we could gain the royal ear, and impress that the same power might be exerted to obtain for the people a body of law which should alike secure the public freedom and the public authority. Let her Majesty ask of her advisers, the Lord Chancellor, the Lord President of the Council, the First Lord of the Treasury, the Secretary of State at the Home Office, why the people of England may not, like the people of France, and like the people of New York, have their laws brought together in a convenient form for reference, whether that form be called consolidation or codification; and supposing she receives for an answer a confession of incapacity, or of unwillingness, let her, on the next change of ministry, and of every change of ministry, repeat the question, and, at the same time, take occasion to show that she feels an interest about it. At all events, let her require her ministers to report to her the state of the matter, the suggestions that have been made for its execution, the means that are available, and the reasons for not pressing it.

If the Sovereign should manifest an interest in the subject, the ministers would manifest an interest; if the ministers manifested an interest, their sub-ministers would manifest an interest; and so on to the very bottom of the rank of office, an interest would grow up, half-realizing the work by removing half the hinderances.

To the people we say, Your task is easy; if you memorialize your member (this is more potent than petitioning), he will show an interest, and will influence some fellow-members; the members having an interest, the leaders must follow; the leaders following, the rival politicians must follow too; and thus the question will grow.

The pretence now is, that nobody feels an interest; or that, although the interest is felt, the means are not apparent.

Let the means already suggested be collected in immediate relation with the wants, be marshalled in a well-ordered design, and reward be offered for the execution of the work according to design, and English energy will be found as capable as the energies of other countries to do the necessary work.

Different bodies of persons might lend their help. The

Society of Arts might learn the state of the law as it affects different classes of industry and invention; the British Association might ascertain the law as it affects different branches of science; the Law Amendment Society might add to its claims on the public, by devoting itself to a review of the existing tribunals, and their distribution over localities, and over subject-matters, and the deficiencies of jurisdiction which interfere to prevent full justice; the Mechanics' Institutes might usefully ascertain the law of their respective localities.

Everybody may contribute a quota of service, either by giving information of defects, or by memorializing members of Parliament, and petitioning the two Houses.

With this help, the press would do excellent service; the labour of investigation and of complaint being performed by others, they would report and discuss.

Each has only to claim that his own law should be brought home to himself, with sufficient indications of the position it takes in the more general scheme of law; and this may be done by the easy method of systematic indexing, in full, of the matters of law which apply to him, and which are now scattered over a thousand volumes.

The people have reason to complain that the statesmen of the country, or those who aspire to be statesmen, do not take thought of this subject as one of statesmanship, which, in truth, it is.

If a man calling himself a statesman should take as little heed of the means of communication, of roads, of canals, of railways, of the telegraph, of the Post Office, of the periodical press, of the literature of the country, he would be universally scouted as unworthy of his position, or his pretensions. Why not so in this matter of law-making, which is an affair of politic administration, of finance, of administrative efficiency?

It is true that the question in its present state is a dry one, appertaining to the mechanics, not to the philosophy, or the morals, or the æsthetics, of law-making; but nevertheless it is in that state in which it needs the statesman's sagacity and the statesman's will. It is for him to pronounce the fiat that shall call into existence—or rather into action—all the suitable

abilities for executing the tasks of detail. He has, in other directions, great results evolved from processes as dry and unexciting; results of which the world is proud, and statesmen who did not favour the initiatory processes take credit.

But, in truth, the difficulty and distastefulness of the work arise from inattention to it. There is no reason why the literature of the law should not be as agreeable as any other literature, if rightly handled. The clear expression of the driest matters which our present Premier gives, might be given to law itself. It is as susceptible of, and indeed requires, the same elegant expression; for elegance implies appropriateness,—the selection of the aptest terms.

Law is clumsy and confused, because it is a mingled yarn,—things are put together without regard to the occasion.

If all that does not appertain to law, as law, were rejected,—if the matters relating to the organization and action of the tribunals, of pleading, of procedure, and of forms, were treated separately, each after its own proper manner, and treated fully, but concisely, in apt terms,—the law would be elegant and refined as a composition, and would be convenient and intelligible to every class of persons.

We trust that her Majesty, whose chance of seeing the fulfilment of the Chancellor's promise of a Victoria Code in her day is perilled by the purposeless proceedings hitherto adopted, will demand of her ministers the consideration of this topic as one of the highest statesmanship, involving, as much as any other, the happiness of the people and the integrity of the institutions of the country.

Nor should she hesitate to appeal to all the statesmen of the country. It was one of the merits of Sir Robert Peel, and of Sir James Graham too, that they lent their aid to measures of this sort. The Marquis of Lansdowne also, in former times, urged it on; and we see no reason why every statesman should not set himself the task of giving to the enunciation of the national will, in some one or other of its laws, an expression clear and explicit, worthy of the policy which it is to realize.

Doubtless he will find, when he applies himself to this work, that the task is not one of words, but of things,—not of bits of

things, but of the whole framework of the Constitution. He will find that, from want of a code, he has to seek, and indeed to make for himself, a statement of the existing Law, and that having found it, and framed his measure, the mental image of what the Law is, requires to be reduced to writing, that he may append thereto the addition which he is making ; or if, yielding to the pressure of time, and to the want of authority, he resolves to pass his measure without so fixing its basis, he will find that the priests of Ephesus will not recognize his view, and will soon surround it with doubts that take from it its character of *Law*,—of a rule whereby men are to be governed.

All this while, the position of the statesman is that of the skulking schoolboy, who gets another to write his theme ! His measure, wisely conceived, is put forward in cramped and loose phrase, which he himself does not understand, and he wins the discredit of failures which are due to the necessity of using another's tongue to express his thoughts.

Is this decent statesmanship ? Is it not worth while to put matters on such a footing, that the statesman and the people may meet one another face to face without a dragoman, who does not understand the language, or feelings, or views of either ?

The lawyer has his virtues, but they are neither statesmanlike nor popular ; they regard the exigencies of his profession, not the every-day action of life, or that profounder philosophy which it is the statesman's business to embody in the people's laws.

Where are our forward members in this matter ?—where Lord John Russell, Sir James Graham, Mr. Gladstone, Mr. D'Israeli, Mr. Cardwell, Mr. Milner Gibson, Mr. Henley, Mr. Lowe, Mr. Walpole, Lord Goderich ?—We take them by haphazard, as examples of default ; there are other wrong-doers—why do they not go into the question, and ascertain the principles upon which Form depends, the rules of legislative science, and its artistical application in this matter ?

Every word, every phrase, every sentence, every clause, every section, every chapter, every part, every Act, has, or ought to have, its purpose, and, so far as it corresponds in purpose with other things of the same kind, should have an expression cor-

responding with it, that expression consisting not only of the terms selected, but of the order in which they are disposed, and the manner in which they are constructed.

Now, our statesmen, when they make speeches, when they write despatches, or minutes, or letters, do precisely, and in a good manner, what is requisite to be done in the more lasting and permanent matter of an Act of Parliament, following unerringly the exigencies of the case.

What, then, is the reason that our statesmen repel this subject? Is it want of sense, or want of industry, or want of zeal, or want of knowledge?

Before concluding, we must notice the able works at the head of this article. The Suggestive Letters would well repay perusal. It is a pity that they have been printed privately. They are indeed suggestive of the requirements of the case, and merit general perusal. Mr. Bellenden Ker fares as ill from "Earnest" as he does from almost every other writer on the subject.

We had intended to quote largely from it, but we could not well touch part without taking the whole. We claim, on the part of the public, the Profession, and the labourers on this subject, the publication of the pamphlet.

Mr. Amos's work, "The Ruins of Time," ought to be read by all legislators as a help and a warning. The author states in his preface,—

"A principal object of the present publication is to contribute a few results of experience towards the adoption of a Code of Criminal Law; by which is herein meant a consolidation conjointly of the Common Law and of the Statute Law, with its judicial constructions, according to a scientific arrangement, terminating all controverted questions, and expressed in a manner suitable to legislation of the present day, together with such amendments as are obviously dictated by justice and expediency."

This appears to us a complete definition of the predicament and the object. But we do not subscribe to Mr. Amos's view that the Code of Criminal Law should be dealt with first, and that the Code of Civil Law should be postponed; for the former

depends greatly on the latter. The latter is the precedent matter, which it is the business of the Criminal Law to enforce by its responsibilities. Yet we are willing that the two works should be intrusted to different hands, working at the same time, and in communication with each other, under the direction of the same presiding authority.

Mr. Amos puts well, too, the difference between the work of Consolidation and the work of Revision.

"In remodelling the Statute Book, it is to be observed that there are two very distinct operations to be performed: one, the consolidating of dispersed enactments in force, and making way for it by repealing what is to be more methodically re-enacted; the other, the eliminating of whatever has been, or is, obsolete or expired."

Upon this matter "Earnest" has some good remarks, which we would quote, if our limits had not been already reached. Again we call upon him to publish his pamphlet in regular fashion, that all may have access to it.

We have dwelt at large on this subject, for it is the very topic of the day,—cabined, cribbed, confined by those who have charge of it, and wanting but an imperial will and resolute pertinacity to be realized. But in this country we have no will nor united purpose;—the rulers wait on the people, the people on their rulers: by propagating common notions on the subject, we may come to a common action.

POSTSCRIPT.—We regret to find that the vote to be taken for the present year is to be only 1,911*l.*; being 1,000*l.* for Mr. Bellenden Ker, the paid Commissioner; 600*l.* for Mr. Brickdale, the secretary; 100*l.* for a clerk; 80*l.* for a messenger; 31*l.* for a laundress; and 100*l.* for contingencies.

For draftsmen and other aid—*nil*. A sum extravagantly inadequate for the work: no good honest work can be done with such means so employed.

ART. XI.—LAW OF EVIDENCE IN SCOTLAND.

A Treatise on the Law of Evidence in Scotland. By WILLIAM GILLESPIE DICKSON, Esq., Advocate. In two volumes. Edinburgh: Bell and Bradfute. London: William Maxwell. 1855.

WE mean it no disparagement to the learning of what is called the Law of Evidence when we say that we know of no department of practical jurisprudence which is more intelligible, or more easily or plainly resolvable by obvious and rational principles of analysis. Not only without, but in its nature and office opposed to, artifice and chicane, evidence is the one broad field of the domain of law, where truth, its security and protection, constitutes the whole system. As an instrument of justice, it has no technicality: it is incapable of subtlety, and cannot be refined; and if it has acquired any distinctive learning of its own, that has been owing rather to experience of the obscurity and fraud of testimony, than to the studious elaboration of lawyers. And in its improvement it has advanced so rapidly and liberally, that the distance between *admissibility* and *credibility* has all but disappeared, if, indeed, the latter has not altogether taken the place of the former. There is more evidence now,—nay, let us ask what is not evidence now, whether conclusively, or relevantly, or *quantum valeat*? So that if we have not yet fully realized it, we may hope ere long unrestrainedly to put in practice the very satisfactory conclusion with which Jeremy Bentham consummates a great deal of deep thinking, obscure metaphysics, and difficult reasoning, on what, with improvised verbiage and the pertinacious iteration of sustained contempt, he denounces as “the incongruities” of our system; namely, that—“1. There is but one perfectly good and fit mode of collecting evidence;” and, “2. That this is *no other than what common sense suggests*; and as far as power and opportunity admit, and the importance of the occasion appears to demand, *is naturally, and commonly*

practised in the bosom of every private family;"¹ that is to say, if we may be allowed the application, Courts of Justice in their examination of facts ought to be guided by the same common and natural instincts which regulate the communications and intercourse of society, or (hinting delicately in the direction of *nisi prius* controversy) of one gentleman with another! Such, after all, is the climax of our subject—such the triumph of "common sense"! Yet, despite this simple reduction of its great dialectician, evidence, in presence of his own labyrinthic subtlety, was a deep and anxious matter, and it has continued to tempt the wanderings of the juridical student:—it has had its philosophers and its legal speculators; nor has it been unvisited by the dreams of its nebulous thinkers,—nay, it has hardly had an author who has not deemed it necessary to introduce his exposition of its very practical qualities, by a certain amount of metaphysical lore and fine writing. Of this tendency to learned surplusage we could give numerous illustrations, and demonstrate how clear and strong-headed authors of excellent books may be tempted into reflections and inquiries, either not relevant to the matter in hand, or unsuitable and unnecessary to its consideration. Mr. Best's treatise is perhaps less open to objection on this score than any similar one, although it is professedly and characteristically a theoretical treatise. It is a work on the analytical qualities of evidence; and he has certainly shown great ability and ingenuity in turning the principles of examination, which he applies to his subject, to practical account. But almost all writers on evidence, since at least the days of Jeremy Bentham (whose troublesome fire they have either imagined they have caught, or felt it their duty to appear to catch!), have been more or less addicted to redundant philosophizing. In regard to Scotland, and foremost among these contemplative literati, stands Mr. Glassford, a learned and worthy gentleman of the Scotch Bar, who, in the attempt, some forty years ago, to turn an intended article for the *Encyclopædia Britannica* into a book, produced a treatise distinguished more by the elegance of its style and its scholarly diction, than by its forensic utility. Mr. Glass-

¹ Bentham's Judicial Evidence, chap. xx.

ford wrote in the days when Scotch lawyers were animated by a literary ambition, which was not considered to be beyond their profession; and it cannot be denied that the work has great literary, and even considerable didactical merit, although, for the purposes of instruction in the rules and practice of evidence, we would hardly put into the hands of students, and much less into those of gentlemen engaged in legal business, a book which, notwithstanding the deference it evinces for "testimony" and the aforesaid "common sense," delights in the racy discussion of such topics as "sense," "consciousness," "memory," "the moral faculty," "testimony," "judgment and reasoning," "demonstrative reasoning," "probable reasoning," &c. ! We hope we do not scandalize our sentimental readers, if we declare that we would leave such erudition to keep company with the German pundit and his pipe, while for our part we would proceed to business.

And to those of the same humour Mr. Dickson's work will commend itself at once. There is about it a lawyer-like tone and purpose, very much to our liking; and it is with the feelings of kindly critics that we regard its well-filled pages. Mr. Dickson, as a writer on the Scotch Law of Evidence, was preceded by Mr. Tait, of the Scotch Bar, a gentleman who contributed a very excellent and useful volume, which was long held in great esteem by the Courts; for, while Mr. Glassford was rounding his periods, Mr. Tait was busily occupied with the composition of a work very much more to the purpose. In the preface to the first edition he thus alludes to the circumstance :—

"The author had this work nearly ready for the press, and had written this preface, when Mr. Glassford's work on evidence was published. But, although that work contains enlarged and interesting views on the general sources and principles of evidence, it did not appear to him to supersede the occasion for a work of more detail and reference to authorities for practical use."

The same preface begins thus :—

"In every country in which jurisprudence has been cultivated, the rules of evidence have been considered as one of the most interesting and important branches of the law; and in most countries they have been suitably attended to, collected, and arranged by

institutional writers. *In Scotland, however, they appear to have been in a great measure overlooked.* They are not to be found in any one place in a systematic form, and must be collected from a few brief notices by Lord Stair and Mr. Erskine, and from a great multitude of decisions, ancient and modern, sometimes not very easily reconciled with each other, dispersed through a very voluminous series of promiscuous reports, and even through many different heads of the dictionaries (of decisions)."

Such was the state of things as to the Law of Evidence in Scotland little more than thirty years ago! Mr. Tait's preface is dated the 12th November, 1823, or nearly nine years after the institution of trial by jury in civil causes!

Further in the same preface Mr. Tait says:—

"Perhaps some persons may think an apology necessary for so little reference being made to the law of England. But, although the English system of evidence, taken as a whole, with the mutual dependency of the various parts upon each other, may, in practice, be found to be a very equitable system, *perhaps* LITTLE INFERIOR to that of Scotland; (!) yet the author has not been able to discover, notwithstanding a pretty extensive consideration which he has felt it to be his duty to bestow upon that system, that it would be at all suitable or expedient, except in certain rare cases, and with extreme caution, to introduce detached fragments from so different a system, in order to supply any blanks that may be supposed to exist in the law of Scotland, and still in any case in order to displace any of its ancient homogeneous doctrines."

Indeed, after declaring, as he at least plainly leaves us to infer, that "the English system of evidence" is inferior—"perhaps little inferior"—to the system in Scotland, where, however, the rules of evidence, as he informs us, "appear to have been in a great measure overlooked" (what a sad plight must we then have been in!), we need not be surprised that Mr. Tait should not have discovered, by his "pretty extensive consideration," anything particularly good in that department of practice on which, of all others, the English lawyer piques himself.

Accordingly, Mr. Tait's work—if we may except a few references to Peake and Phillips on evidence by Acts of Parliament, Gazettes, and other public documents—is almost exclusively founded on the Scotch Municipal Law. It is indeed all Scotch but the *name* of its subject; for the term "evidence" is purely English, and in Scotch law is an English importation. The old Scotch term is "probation," under which will be found, in the respec-

tive Institutes of Lord Stair and Mr. Erskine, not, as Mr. Tait describes them, "a few brief notices," but clear, systematic, and interesting elucidations of the character of evidence, the means and mode of proof, known to and practised in the times of those learned writers, by the Scotch Courts. And so anxious is Lord Stair to refer his system to a pure and just source, that, in explanation of the rule that "writ comprehends both *Chirographum* and *Typographum*," he thus deduces the authority for his argument:—"This we see to have been the ancient custom, by some of the Apostle Paul's epistles (2 Thess. iii. 17, 18):—"The salutation of me, Paul, *with my own hand*, which is the sign in every epistle: *so I write*. The grace of the Lord Jesus Christ be with you all, Amen.'" Mr. Erskine, again, does not deal in theological speculations, but is content, *inter alia*, to show, in honour of the country, that proof by "single combat" was put an end to in Scotland about the year 1600; while his last editor, Mr. Macallan, adds in a note:—"This mode of proof was only abolished in England by the 59 Geo. 3, c. 46; down to which period it was held to be still in force (Ashford, 1 Barn. & Ald. 405)."

But notwithstanding the superior enlightenment of the Scotch law on the subject of evidence "by single combat," and the curious opinions of Mr. Tait, there cannot, we apprehend, be a doubt that, until the establishment of the trial by jury in civil causes (itself, by the way, an English mode of proceeding, not so skilfully applied in Scotland, perhaps, as it might have been), Scotch litigants were frequently indebted to the English lawyers in the House of Lords,—thinking, reasoning, and acting under the light of the English law,—for having prevented the rules of evidence, as then applied in Scotland, from consummating injustice and mischief; and it would not perhaps be an extravagant inference to suggest that the anomalous appeal to the Lords on facts and evidence,¹ preserved in their pristine purity the good old principles of the Scotch law of "probation," which an

¹ Yet it has been doubted whether, after all, such an appeal, by which the review of the facts and evidence was either immediately followed by judgment, or by a remit with a view to judgment, is not better than the contrivance of a *new trial*, or *new trials*, the delay occasioned by which is an inconvenience only inferior to the enormous cost it occasions.

otherwise arbitrary and irresponsible inquisition might have permanently corrupted.

An instance of this protective prætorianism, as we may call it, of the Lords, is before us in a Scotch appeal, which was decided in 1820. This was the case of *Dunbar v. Harvie* (2 Bligh's Reports, 351), and it discloses not only extraordinary notions of evidence, but the strange fancies on pleading, and on the conduct of litigation generally, which at so late a period disfigured the administration of the Courts of Scotland. The case is frequently referred to by Mr. Dickson, yet never with rebuke, nor even with that full examination which such peculiar procedure would have appeared to us to demand at the hands of a writer on Evidence, although our readers are not to anticipate from this passing remark an unfavourable notice of his work. Our author is content with the result as determined by the House of Lords; whereas we think it would have been useful to the Profession in Scotland to have pointed out wherein the Court of Session had miscarried; for most justly and properly the judgment was reversed. Mr. Bligh's report occupies about forty pages, and for this lengthened detail he apologizes in the following note:—

“The form of pleading and the conduct of causes in Scotland being a subject now under discussion, this case is reported more at length than is necessary for the purposes of the report, with a view to exhibit a *familiar example* of the ordinary course of litigation in Scotland, upon a question of fact, decided in the Court of Session before the passing of the Jury Court Act.”

Cruel Mr. Bligh!—and was this “a familiar example”? We would not be understood as meaning familiarity as respects the subject-matter of the action, for the case was all about a cask of *whisky*; (!) but the learned reporter's object was of course to point out to the admiring eyes of Westminster Hall the anxious judicial expedients of these good old times of the Parliament House! But just let us look into this familiar example. The facts were few and simple: it appeared that the appellant, Dunbar, was an innkeeper, and had been in the habit for some years of purchasing whisky from the respondents, Messrs. Harvie, who were distillers and spirit-dealers; and, according to the mode of dealing established between the parties, when the

whisky was supplied, an invoice or account, specifying the quantity and price, was sent with it; Mrs. Dunbar, the appellant's wife, who was unable to write, or to read writing, being intrusted with the management of the business. The respondents, when they received payments, marked them in the invoices, which was the only voucher or discharge for the appellant. And in this way things proceeded, pretty smoothly and regularly, from May 1808 till August 1809. But some months after this latter date, the respondents called upon the appellant to pay the sum of 55*l.* 12*s.*, as the price of a hogshead of whisky alleged to have been delivered at his house on the 2nd June, 1809, which, through inadvertence, had been omitted in the statement of accounts. Failing to arrange the matter with the appellant, who relied on the accounts before delivered, the respondents brought an action in the Sheriff or County Court of Lanarkshire. The appellant, by his "defences" or plea, denied the receipt of the hogshead of whisky, and on this fact issue was joined. Now, how was this fact inquired into? In the course of the action, and on the motion of the respondents, the appellant and his wife were ordered to undergo what is called "a judicial examination," a proceeding still competent, and the law respecting which is fully expounded by Mr. Dickson. We may here just quote his general explanation:—

"The rule which, before the passing of the Law of Evidence Amendment Act, excluded party witnesses, was modified in some cases by allowing a party to have his opponent examined *in causâ*. The object of this proceeding was to prevent one of the parties from defeating justice by concealing facts of which there was not likely to be evidence from the ordinary sources of information. The procedure is still competent, although its importance has greatly diminished since the admission of parties as witnesses. Still, however, it is usual where this class of witnesses are excluded, and in other cases, where it can be obtained (as it sometimes may), before the record is closed (*i.e.* conclusion of the pleading). The examination, which is not upon oath, is taken down in writing, and signed by the party."

Such was the ordeal to which Mr. and Mrs. Dunbar were subjected. The husband, however, appeared to have been excused, and as for the wife, her examination came to nothing; whereupon the sheriff allowed "a proof, *prout de jure*, of the

disputed article of the accounts, the defender of his defences, and to both a conjunct probation ;" that is, in plain terms, a proof by all means of evidence within reach of the parties. To this procedure, however, the appellant objected, and the cause was shortly after "advocated," or removed to the Court of Session, where it came, in the first instance, before the late Lord Meadowbank, who, on hearing parties, appointed "a condescendence" to be given in by the respondents. The condescendence was followed by "answers," and thereafter "Lord Meadowbank ordained 'informations' [written argument] to be printed and laid before the Court;" on considering which, another condescendence was ordered "of the facts and circumstances which they [the respondents] aver, and offer to prove, in respect to the delivery of the whisky in question, and that *quàm primum*." This called forth, in the form of "answers," long and elaborate objections on behalf of the appellant to the relevancy and admissibility of the evidence offered; without success, however, for on the 10th March, 1814 (the proceedings had commenced in 1810), the Court allowed the proof, and appointed a Commissioner to take it. Mr. Bligh then, with apparently great zest, sets out the said proof, the weight of which, in the opinion of the Court, was against the innkeeper, and in favour of the distillers; for on the 15th November, 1814, that is, upwards of eight months after the proof had been ordered, the Court gave judgment for the £55. 12s., the price of the cask of whisky, with interest and costs.

The appellant then had recourse to a proceeding which occasioned the extraordinary and unheard-of oddity, to which we particularly beg attention, and which, inversely, reflects no little interest on Mr. Dickson's labours. Had he flourished and written his book in the year of intellectual and judicial grace 1815, we wonder what he would have said of the following procedure on the part of his Court. After the above judgment had been given, Dunbar, the appellant, applied by petition, as was then the form, that it be reviewed, or reconsidered; whereupon the Court, "being of opinion that the case depended materially on the credit due to the excise-books, made a remit to James Bruce, Secretary to the Board of Excise for Scotland,

to examine these books, and report WHAT CREDIT appeared to him to be due to the entries contained in them"!! Having thus delegated their office and jurisdiction to Mr. Bruce, that worthy gentleman had no difficulty in instructing their Lordships as to their duty in the premises, "and that the entries made in these books ARE HELD AS SUFFICIENT EVIDENCE of the delivery and receipt of the excisable articles therein mentioned, and particularly of the hogshead of whisky in question"!!

What follows is really beyond comment. The solicitor for the appellant *actually waited on Mr. Bruce to inquire how he could make such a report to the Court.* (!) The result of the interview being stated in a "note," which was presented to the Court, and from which it appeared that Bruce had made his report (his legal opinion on the evidence included!) *without ever seeing the disputed entries contained in the excise-books;*—that he had examined the persons in the Excise Office, who made out the excerpts from the books mentioned in the pleadings, by which he was satisfied that these were fairly taken; "and therefore *he had no occasion to see any books on the subject, because, in his official capacity, he could never admit that there was any error in the excise-books*"!!! In the face of all this, the Court deliberately adhered to its former judgment, (!) and the case was appealed to the House of Lords, where it must have astonished the judicial nerves of the eminent men who argued and decided it.

The appellant's counsel had easy work of it; but the argument for the respondents, and in support of the judgment, was interrupted by such remarks as these from the Chancellor:—"It is difficult to ascertain on what principle the Court referred the point to Mr. Bruce." "That a Court of Justice should refer to any man to know whether a document is, or is not, evidence, is to me a novelty." "Is it in Scotland *præsumptio juris et de jure* that an exciseman cannot be mistaken?" "It is marvellous if such things as the certificate of Mr. Bruce, and the excerpts (produced as they were), can be considered, by the law of that country, as admissible evidence." His Lordship could not be so persuaded, and the judgment was reversed.

The case was actually *ten years* dragging itself through the various Courts! The proceedings commenced in 1810, final judgment was given in the Court of Session in 1815, and in five years after, in 1820, it was reversed by the House of Lords; and all this on matters of fact and evidence!—fact and evidence, too, relating to some 55*l.*, the price of a cask of whisky! About six months after the Court of Session had given its judgment, the new Jury Court for the trial of issues in civil causes was opened, and there, as it soon was made to appear by its successful procedure, this edifying case of *Dunbar v. Harvie* might have been tried, heard, and determined in as many *hours* as it had occupied *years*.

We do not mention this case in any marked way, as a reproach to the learning and professional acumen of the Scotch Bench and Bar of the time; but as an instance of judicial miscarriage, arising from an erroneous procedure, and the want of clearly defined rules of evidence. In fact, there were no means then, within the Scottish civil judicature, of determining what evidence was,—the matter was left to a “Commissioner,” who was generally a young advocate, with private claims on the friendly consideration of the Court; and the “act before answer” got rid of every difficulty. The judges longed to grapple with the law of their cases, and for that purpose were willing to take the facts as they might be most conveniently discovered. The consequence of all this was, that the Scottish Forum in those days contained more eminent professors of the science of jurisprudence than practical lawyers, and the theory of legal justice was more considered than the means of its actual and certain attainment. The principles of pleading were unknown, because contemptuously ignored; juries were sincerely and cordially despised; and as for evidence, it was left to shift for itself. The popular sneer respecting the difference between law and justice, had then a meaning; and it must ever be so with an artificial system of legal administration, which is incapable of advancing with the age, and of adapting itself to the growing wants of society. Nor, perhaps, it may be said, could it be shown that the history of the Scotch law is worse, in this respect, than the annals of our own.

Common-law pleading, as practised within the memory of these very days; the delays and costliness of that "roguish thing," equity; and the gross abuses of our Ecclesiastical Courts, could, we fear, tell sad and harrowing tales of injustice and wrong. But we have no invidious object; and if we apply a severe candour to the times of awkwardness and error, it is chiefly with the view of exhibiting and contrasting the happier state of things that now prevails in the Courts of the North, and congratulating the Bar and the people of Scotland on the change.

And that we may do so, Mr. Dickson is our surety. Whether as respects the liberal and enlightened spirit in which he writes, or the law he lays down, the change is indeed remarkable; and the transition from *Dunbar v. Harvie* to his pages is really the passing from darkness to light. That his work contains a full statement of the Scotch Law of Evidence may be assumed from the fact that it consists of two large volumes, and 1030 large and full pages, exclusive of addenda, appendix, and index. The size of the work will indeed surprise the English practitioner; but the comprehensive principles of the Scotch law, the great accumulation of matter since the publication of Mr. Tait's treatise, the contributions on the general subject by English writers in the meanwhile, and the completeness and scope of Mr. Dickson's labours, sufficiently account for his very ample exposition. And it is eminently practical. It is a book for use, and not merely for reading and musing over. In truth, so considerate is the learned gentleman, and so conscious is he of one's natural impatience of dialectical preaching on general principles, that he mercifully inflicts upon us a very brief "Introduction;" and yet, brief as it is, we would have been content with the last paragraph, in which he informs the reader what his book is about, and which, we venture to suggest, would have been quite sufficient. However, we do not quarrel with the Introduction, for it is very short; nor shall we wait to discuss some of its "canny" *dicta*, about which we are rather sceptical. We are better pleased with the Preface, preceded as it is by a well-expressed dedication "to the Dean and Faculty of Advocates," which considerably increases the authority of the work; for it

is there stated that the "treatise is inscribed as a tribute of sincere esteem, and in acknowledgment of much kind and valuable assistance received by the author from many of his brethren of the Bar during its preparation." The Preface, which is conceived in a spirit very different from the narrow and strange views of Mr. Tait, begins thus:—

"For several years, the want of a treatise on the modern Rules of Evidence in Scotland has occasioned much inconvenience and difficulty, both in the study and in the practice of this branch of the law. The object of the following pages is to supply the *desideratum*. With this view the author has endeavoured to collect and analyze all the Scotch authorities on the subject. He has also borrowed whatever light could be thrown upon it from other systems of jurisprudence, especially those of England and America; and that not merely by examination of the corresponding chapters in the best English treatises, and in the comprehensive and philosophical work of Professor Greenleaf, but also by constant reference to the decisions and other original authorities in English and American law. Care has, at the same time, been taken to point out any peculiarities in the law of Scotland which destroy or impair the applicability of illustrations from the systems of other countries."

This we are bound to say, after an attentive perusal, is a faithful account of the book, which, throughout, goes largely and fairly into the English Law of Evidence. It begins with the elucidation of "the general rules applicable to all kinds of evidence," and under this we have a clear explanation of the law relating to "the burden of proof;" of the "relevancy of evidence;" "of the verdict;" of "proving the substance of the issue;" "of the rule which requires the best evidence;" and so on in logical order, and in very sound law.

We had marked a number of extracts from the work, but we are here obliged to break off. In our next number we propose to continue the subject, and among other topics to direct attention to "hearsay" evidence, the rule of admissibility in regard to which, in the Scotch system, appears to go farther than with us; with a few remarks on circumstantial evidence. In connection with the subject of documentary evidence, we shall explain and compare the English and Scotch respective methods of proving the contents of a lost instrument. In the Scotch law the remedy appears to be more precise in form, and more complete in substance, than with us. And we shall conclude with the

mode of proving foreign law, on which interesting subject Mr. Dickson offers some very important suggestions.

For the present we recommend his work to the Profession. Its literary and juridical merits justify us in doing so; and it is, we may add, the latest work on evidence. It brings the cases, English and American, as well as Scotch, and the statutes, almost down to the present hour; and it does this not in the form of notes, but in the body of the text will be found the latest authorities and illustrations. To the Scotch lawyer such a work must be invaluable, while it may with benefit be consulted by the English practitioner.

ART. XII.—JUDICIAL STATISTICS.

IT is probable that many of those who heard Lord Brougham address the House of Lords some weeks since on the subject of Judicial Statistics, or perused his speech in the imperfect reports of the daily newspapers, or the authorized pages of the *Law Amendment Journal*, expected neither more nor less result than has followed from his other efforts in the cause of Law Reform. Less they would not look for, because the speech in question was in no wise inferior to the numerous harangues on which his fame as an orator has been built. His eye has not grown dim, nor his bodily force abated; and the generation which has grown up since his reputation attained its zenith, under sovereigns whose names belong to history, can find no man yet to match with him, or with Lord Lyndhurst, his venerable compeer, in that pith and sinew of oratory, the power which can grapple with a large subject, and bring its salient points in culminating succession before the audience. But when men recollect the long intervals which have always elapsed before the improvements he has advocated have been carried out by a cautious—we will not say a timid or a slothful—Legislature, they may be forgiven for anticipating a like

interval between this admirable enunciation of what must be done to give us a good system of judicial statistics, and the fortunate hour when the plan thus enunciated shall have been transformed from a theory into a fact. This is, at first sight, a not unreasonable supposition; but we ourselves believe that it is one which will prove to be erroneous; and we will proceed to give our reasons for this conviction.

It is true that the progress of Law Amendment, though immensely accelerated of late, has been, during the last thirty years, laborious and slow. It is true that our legislation in this direction has been fragmentary in its nature, and that even the numerous and great improvements made in recent years are only bits out of the great whole which Lord Brougham, in glowing eloquence, sketched out to a former generation. But with respect to the chances of future legislation—and it is this we are speaking of—it is impossible to exaggerate the change. The public mind has been so thoroughly imbued with the idea of Law Reform, that it is no longer startled with any proposed innovation. Nor has the professional feeling on the subject been less inverted. Lawyers, as a body, are no longer wedded to the fashion of the past, but are desirous of weighing the utility of everything that comes before them in their daily practice, and of lending an impartial ear to any suggestion for improvement. There is now little *prestige* of ancient days attached to our legal proceedings. The idols of the Forum have been thrown down; and it would be as difficult to persuade the men who have risen into practice contemporaneously with County Courts and Procedure Acts, that there was any glory in a special traverse, as it would have been to have convinced the Hellenized Egyptians who read Plato in the court of the Ptolemies, that the god Apis was other than a brute. Rash innovations, fanciful theories, are still justly rejected by a Bar which loves to have a solid reason for everything; but no rational proposal for practical improvement is likely to die still-born for want of a hearing. How certain, then, it is, that a plan which so commends itself to our common sense,—which, from the very nature of things, is so obviously desirable, as that of acquiring accurate information as to the *personnel*,

business, and efficacy of our various courts of justice, and arranging that information in an accessible and instructive form, how certain, we say, it is that such a plan, once clearly propounded, will meet with eager support from the public, from the Bench, and from the Bar. Again, the advocate for establishing a system of judicial statistics has no vested interest to contend against. This is a most important consideration in estimating the chances of a speedy success. We believe that not a single measure of law reform has been as yet propounded which has not aroused the hostility of some section of lawyers. The Common Law Bar are willing enough to reform the Court of Chancery, and the gentlemen of Lincoln's Inn have a keen eye for the abuses on the other side of the Hall; while both are ready to join forces in order to sweep away Doctors' Commons. But though all are ready, more or less, to swim with the stream, none are desirous of cutting their own throats in doing so; and though the Bar are certainly not open to the reproach of any wilfully selfish opposition to the amendment of the law, yet their eyes, like those of other men, have failed sometimes in a clear vision where their interests, real or fancied, happened to be at stake. But through the whole range of the legal profession, we know not of any class likely to suffer in any way by the establishment of a Judicial Statistical system. We have heard, indeed, of a bench of magistrates who refused to assist in the administration to the public of that infinitesimal dose of criminal statistics prepared by the Home Office, in the shape of a new and uniform calendar of prisoners. The quarter sessions Hampdens stood by their ancient calendar, wisely considering that there was no knowing where such innovation might stop, and that Mr. Redgrave's forms might be the thin end of a wedge about to be driven into their lives and liberties. But such wisdom as this is rare in our degenerate age; and we may safely conclude that the great majority of our judicial officers, from the highest to the lowest, will gladly lend a helping hand to exhibit the nature and machinery of their respective courts.

In the third place, the Government, whatever party may be

in power, will be ready to push on the work. Men in office feel the deficiencies in necessary knowledge which arise from the want of any organized returns of our judicial administration. In criminal matters, this is especially felt; and as Law Reform is more and more pressed on the attention of Cabinets, it is found that the data for the improvement of civil justice are equally wanting. The attention of the Home Office has been for some time directed to the subject; and with an under secretary so well acquainted with legal matters, and so able and intelligent, as Mr. Massey, we do not doubt that official inquiry will flow into the proper channels. At all events, there will be no prejudices in Downing Street against the adoption of the plan.

With these favourable circumstances for once arrayed on the side of a real improvement of our administrative system, we may anticipate a speedy success for the advocates of the collection of judicial statistics on one settled plan. But what is this plan to be? Here, in truth, lies the only difficulty in the way. The French system is too elaborate, too perfect, to be introduced here at first with any chance of success. We must never forget that we have not merely to sketch out a plan for the work, but to teach our officials how to carry it out. Hitherto we have had nothing like Judicial Statistics, as they are known in most continental countries, and we cannot organize the whole machinery at once. We imagine that for some years our efforts must be, in a great degree, tentative and educational in their nature; but the better plan we start with, the sooner we shall arrive at real working results. We are aware that the Law Amendment Society have turned their attention to the subject, and we are convinced that they could not make themselves more useful than by preparing some good tabular forms, after which the returns from all our Courts might be made. We insist on this the more, because, while approving highly of the general scope of the resolutions which Lord Brougham brought forward in the House, after the termination of his speech, we observed some details which were in our opinion open to improvement.

We shall watch with great interest the progress of this movement, for we are convinced that the due administration of justice in this country, and in a considerable degree the advance of the science of jurisprudence, will depend on an ample and well-arranged collection of facts, which will throw light on the internal machinery of our Courts, and on the whole course of justice in all its branches.

Errata.

We regret that, owing to the miscarriage of a proof, the following *Errata* have escaped correction :—

- Page 39, l. 14 from foot, for “Reformation” read “separation.”
— 40, l. 19, before case *insert* “Long-Wellesley.”
— 41, l. 5 from foot, for “186” read “16 b.”
— 43, l. 1, for “addressing” read “advising.”
— *Ib.* l. 17, for “hamper” read “transfer.”
— 45, l. 5, *dele* “not.”
— 48, l. 7 from foot, for “ministers” read “members.”

Short Notes of Cases ;

BEING A SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1856.

POINTS DETERMINED IN THE COURT OF CHANCERY.

By O. D. TUDOR, Esq., Barrister.

COURTS.	REPORTERS.
House of Lords	} 5 H. L. Cas. (Clarke) Part 2. 2 Macqueen, Part 1.
Lord Chancellor and Courts of Appeal in Chancery	} 5 De Gex, Mac. & G. Part 2.
The Master of the Rolls	} 19 Beav. Part 3. 20 Beav. Part 1.
Vice-Chancellor Kindersley	3 Drew. Part 6.
Vice-Chancellor Wood	2 Kay & Johns. Parts 1, 2.
Lord Chancellor and Master of the Rolls of Ireland	} 4 Ir. Ch. Rep. Parts 8, 9, 10.

I.—POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Banking Company—Transfer of Shares according to Form of Deed, or by Practice of Directors—Proceedings against Shareholders. 2. Charity Lease—Offer of increased Rent—Allowance to old Tenants. 3. Co-sureties—Execution of Deed by one only—Alteration of Position of Surety—Equitable Relief. 4. Fraud on Power of Appointment. 5. Husband and Wife—Separate Use—Restraint on Anticipation—Acquiescence in Use of Money by Husband. 6. Judgment—Statute 1 & 2 Vict. c. 110—Neglect to Re-register—Effect of Re-registration. 7. Legal Estate—Equities—Priorities. 8. Nun—Profession—Civil Death. 9. Partnership for limited Purpose—Solicitors—Share of Profits in the absence of Contract. 10. Principal and Agent—Insurance Company, how far bound by Statement of Local Agent. 11. Solicitor and Client—Gift to Solicitor by a Will drawn by himself, not set aside on Ground of Presumptive Fraud. 12. Trustee—

Breach of Trust—Liability of Acting Trustee, though not an Active Trustee. 13. **Trustee acting as Solicitor—Professional Remuneration.** 14. **Vendor and Purchaser—Purchaser's Lien for prematurely paid Purchase-money.** 15. **Voluntary Settlement by person indebted—Fraudulent against Creditors under 13 Eliz. c. 5—Bill filed by person becoming a Creditor subsequent to Voluntary Settlement.**

1. **BARGATE V. SHORTRIDGE.** 5 H. L. Cas. 297.

Banking Company—Transfer of Shares according to Form of Deed, or by Practice of Directors—Proceedings against Shareholders.

By the deed of settlement of a banking company established under 7 Geo. 4, c. 46, it was declared that no transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a Board of Directors; such consent to be signified by a certificate in writing, signed by three directors at the least. If such consent was refused, the shareholder might require the directors to buy his share at the market price of the day. After a consent given, the name of the transferee was to be entered in the share-book, and the entry there was to be conclusive against him. A shareholder, having given proper notices to the directors to be allowed to transfer his shares, received back consents signed by three directors, on which he completed the transfers, and they ceased to treat him as a shareholder. It was held by the House of Lords, affirming the decision of the Master of the Rolls (16 Beav. 84), that the directors could not set up their own want of observance of the formalities required by the deed of settlement, in not having submitted the notices to a "Board of Directors," and obtained consents from such "Board," as a ground on which to fix the former shareholder with liability as a continuing shareholder; their course of dealing bound them, and he was released. "Great injury," said Lord St. Leonard's, "would be inflicted upon parties who should enter into a company, if the company might with perfect impunity disregard its own forms and ceremonies, admit parties to a partnership, permit them to leave it, and admit other parties to come in as partners in their place, and then take advantage of a slip in point of form, and annul the whole transaction."

2. **ATTORNEY-GENERAL V. PRETYMAN.** 19 Beav. 538.

Charity Lease—Offer of increased Rent—Allowance to old Tenant.

An order was made in a suit that the Master of a charity should be at liberty to let a farm to the old tenant for twenty-one years, at a rent of 800*l.* a year. After the lease had been

approved of, but before it had been executed by the Master, an offer was made of an increased rent of 220*l.*; but the tenant, in the meanwhile, had laid out a very large sum in artificial manures for the farm. It was held by Sir J. Romilly, M.R., that the offer of so great an increase of rent could not be refused, but that the old tenant was entitled to an allowance for outlay.

3. EVANS v. BREMBRIDGE. 2 Kay & Johns. 174.

Co-sureties—Execution of Deed by one only—Alteration of Position of Surety—Equitable Relief.

It is essential to the validity of the contract of suretyship, that perfect good faith should be adhered to by the parties to it. Whenever, therefore, there is any misrepresentation, or even concealment, from the surety, of any material fact, which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities. Thus, in the above-mentioned case of *Evans v. Brembridge*, a creditor having prepared a deed, containing a joint and several covenant by two co-sureties, and sent it to one of them for execution, but neither procured its execution by the other, nor informed the surety who executed the deed of this fact, but, on the contrary, wrote to him as "*one of the sureties*,"—the principal debtor having become insolvent, it was held by Sir W. Page Wood, V.C., that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant. "The only doubt," said his Honour, "I had was whether it might not be the proper course to order the deed to be delivered up upon some terms, as that the plaintiff should be bound to the extent of half the sum secured by his covenant; but looking to the other authorities, *Leaf v. Gibbs* (4 Car. & P. 466) and *Rice v. Gordon* (11 Beav. 265), which proceeded upon the equities of the parties, it seems to be decided that when once it appears that the instrument is not such as it was intended to be, this Court holds that the legal effect of the instrument is to be got rid of as against the surety. This Court, then, will look at the original agreement between the parties, to see if it appears that they all intended the obligation should be joint and several between the co-sureties. In this case the deed was in that form, and was prepared and framed by the covenantees, who sent it for execution to the plaintiff, thereby giving him the clearest intimation that his liability was intended to be joint and several. After that, it was the duty of the company to

inform the plaintiff that the deed was not executed by his co-surety, as originally proposed, and to ascertain his view with respect to his altered position. It is impossible to say that it was not materially altered by the plaintiff becoming severally bound, especially in this case, considering the relation of the principal debtor to the other surety. The plaintiff may have calculated on the influence that person might have exercised together with himself in inducing the debtor to discharge his obligation. I am of opinion, on the whole, that the plaintiff is entitled to have this deed *wholly* set aside, and, as he was not informed of his altered position, with costs."

4. THE LADY VICTORIA LONG-WELLESLEY V. THE EARL OF MORNINGTON. 2 Kay & Johns. 143.

Fraud on Power of Appointment.

It is a well-established principle, that a person having a power must execute it *bonâ fide* for the end designed, otherwise the appointment, though unimpeachable at law, will be held corrupt and void in equity. In accordance with this principle, in the above-mentioned case, where a father (Lord Mornington), having a power of appointing a sum of money among his children, appointed part of it to a son who had become a lunatic, and was in a very infirm and weak state of health in consequence of his excesses; and from the circumstances attending the preparation and execution of the appointment, it appeared, from the evidence, that the father intended it not for the benefit of his son, but of himself,—it was held by Sir W. Page Wood, V.C., that the appointment was a fraud upon the power, and therefore void. "Holding," said his Honour, "as I do, that the appointment has been made by Lord Mornington, not for the benefit of his son, but for his own benefit, it seems to me consistent with the whole class of authorities, and to follow the principle of the class of authorities, in which the object of the power was capable of entering into a bargain with the father, which this unfortunate gentleman was not, to hold that this is a fraud upon the power, that it is an exercise of the power by which the father endeavoured to obtain a benefit for himself, which, of course, the Court will not allow him to retain; the consequence is, that the deed must be set aside, and Lord Mornington must pay the costs of this suit."

5. ROWLEY v. UNWIN. 2 Kay & Johns. 138.

*Husband and Wife—Separate Use—Restraint on Anticipation—
Acquiescence in Use of Money by Husband.*

A wife being entitled to the income of settled property for her separate use, without power of anticipation, the trustees allowed the husband to use 1,000*l.*, part of the trust funds, for four years. Soon afterwards, the wife separated from her husband, and then for the first time claimed interest on the 1,000*l.* for the four years. She admitted she "had allowed her husband to receive her income, so long as he behaved to her as a husband ought to do." It was held by Sir W. Page Wood, V.C., that the wife was not entitled to the interest claimed. "Of course," said his Honour, "the wife could not beforehand consent to the husband receiving the interest, for she had no power of anticipation; nevertheless, during the period in question, the funds were constructively in the husband's hands. He had the use of money, for which he was bound to pay interest. Suppose he had given a mortgage for it,—a state of circumstances which, I think, would be exactly the same as this,—he would then have been indebted for interest to the wife *de anno in annum*. It is true, there would have been no money in his hands; but if the wife's trustees had appointed a receiver, who had paid the rent of the mortgaged property to the husband, it would then fall within the ordinary rule, which precludes a wife from recovering the past income of her separate estate, upon the ground of a supposed gift by her of such income to her husband. In *Howard v. Lord Digby* (2 C. & F. 634; S. C. 8 Bligh, N. S. 224), the Duchess of Norfolk's case, commented on by Lord St. Leonard's in his 'Treatise of the Law of Property, as administered by the House of Lords' (162, 170), lunacy intervened. In that case, therefore, the presumption of a gift or agreement on the part of the wife was excluded. In this case, the parties separated within a few months after the time when the interest accrued due, and the wife made no demand for interest up to the time of separation, although she did immediately afterwards. She admits she allowed her husband to receive the income of her property generally. I can draw no distinction between moneys in the hands of the husband, the interest of which the wife might have claimed, and moneys out on mortgage in the way I have supposed."

6. SHAW V. NEALE. 20 Beav. 157.

Judgment—Statute 1 & 2 Vict. c. 110—Neglect to re-register—Effect of Re-registration.

In this case it was held by Sir John Romilly, M.R., that if a judgment creditor neglects to re-register his judgment within five years, under 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, it becomes inoperative, as to purchasers, mortgagees, and creditors (both anterior and subsequent), until re-registration, from which period alone it then operates as against them. His Honour, in effect, observed, "that the judgment ceased to be any charge at all when the five years had elapsed; and it became, so far as regarded the interest of a subsequent mortgagee, exactly as if it had been paid off; and the registration again operated only as if a new judgment had been created, and a new charge had been put on the land." In *Beavan v. The Earl of Oxford* (23rd Nov. 1855), it was held by the Lord Chancellor (Lord Justice Knight Bruce *dubitante*), that the omission to re-register within five years did not give priority to an existing puisne judgment.—(See also 18 & 19 Vict. c. 15, s. 6; and *Freer v. Hesse*, 4 De Gex, Mac. & G. 495.)

7. ROOPER V. HARRISON. 2 Kay & Johns. 108.

Legal Estate—Equities—Priorities.

"The whole doctrine of the Court of Equity, about the protection afforded by means of the legal estate is simply this:—A party getting the legal estate acquires no new right in equity in any way; but equity, regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass, just as the legal interest does, by the effect of the deeds, finds itself checked at times, and an obstacle thrown in its way, by an incumbrancer's saying,—'I have got the legal estate interposed; I insist it is mine at law, and there must be a superior equity shown in order to deprive me of my legal estate.' It is merely staying the hands of the Court, by resting on that legal estate, which this Court will not deal with, unless a superior equity can be shown; and although the Court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers, as to enable a person who has an anterior charge to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it,—that is the whole effect of the doctrine, and none other."—(Per Sir W. Page Wood, V.C.)

8. **BLAKE v. BLAKE.** 4 Ir. Ch. Rep. 349.*Nun—Profession—Civil Death.*

It is perfectly clear that before the reign of Henry VIII., persons who entered into religious orders, and had become professed nuns or monks, were accounted dead in law; they could neither sue nor be sued. Immediately on their profession, they ceased to have any legal existence, and the Ordinary might treat them as dead, and might grant administration of their personal estate, and their heirs-at-law might enter into possession of their real estates. It has, however, been decided in *Blake v. Blake*, following the authority of *M'Carthy v. M'Carthy* (9 Ir. Eq. Rep. 620) and *Evans v. Cassidy* (11 Ir. Eq. Rep. 243), that the doctrine of civil death, in consequence of profession as a monk or nun, is not law at the present day. There a petition was filed by Eliza Blake against her sister Maria Blake, for an account of the personal property of the testator, and of the rents received by the respondent since his death, and for a partition of the real estate, which was not devised by her father's will. Maria Blake by her answering affidavit set up the following defence:—That the petitioner, who was of the Roman Catholic religion, had previously to the death of the testator entered into and become a professed member of a certain religious order, known as the Loretto Nuns, and bound by the rules and vows of the said order, and that she had continued and was a professed nun, and a member of the Loretto Convent, near Rathfarnham, in the county of Dublin, and therefore was not entitled to or capable of taking any portion of the testator's real or personal estate, or to obtain any account of the rents and profits, as sought by the petition. The affidavit further stated that the petitioner would not derive any benefit whatever, even if she were declared entitled to a distributive share of the testator's personal estate, or to a moiety of his real estate, inasmuch as it is an invariable regulation of the convent of which she was a member, and of all similar institutions, that all property which any of the professed nuns acquire or become entitled to after their profession, becomes and is the absolute property of the convent; and that by the vow of poverty taken by the said petitioner at the time of her profession, she had given up all interest therein. The Lord Chancellor, however, after an elaborate examination of the authorities, said that he had come to the conclusion that he ought not to refuse the prayer of the petition. His Lordship said that the doctrine of civil death was founded on the pre-eminence and the authority of the Pope

in spiritual matters; and as that was no longer recognized by the law of England, it followed that the doctrine was at an end. That to give any effect to profession, would be, to some extent, to ascribe authority to the Church of Rome. That there was no Act of Parliament which prohibited in express terms the establishment of nunneries in general. After referring to 28 Hen. 8, c. 13, s. 7; 3 & 4 Ph. & M.; 2 Eliz. c. 1, s. 7, and 9 W. 3, c. 1, s. 8, his Lordship added that it might be inferred that profession had no existence at the time of 2 Eliz. c. 1; that between the reigns of Henry VIII. and Elizabeth it had ceased to exist; but there was no doubt that for many years the course of legislation had been directed against the establishment of religious communities. That the 10 Geo. 4, c. 7, s. 38 (the Roman Catholic Emancipation Act), put an end to the future establishment of such communities. The part of that Act which it was most important to attend to was that which exempted certain communities from the operation of the Act. The 37th section specially provided that nothing in it shall be construed to extend to religious orders of ladies bound together by monastic vows; that section recognized the possibility of such communities existing in this country; and it must be presumed that the Legislature understood what was meant by being bound by religious and monastic vows, and had reference to the old law on the subject. That the question was, to what extent did that Act of Parliament recognize the existence of nuns? The case of *Evans v. Cassidy* was the only authority on the subject. That case decided, that the only effect of that Act was *to exempt nuns from the penalty of it, but did not recognize their existence*. That the doctrine of civil death was expressly denied by some of the authorities; others only tended to show that the application of it was now impossible.—(Ley's case, Roll. Abr. E. tit. Grant, p. 430; Co. Litt. 132 a; Chomley's case, 2 Co. 51; The King v. Partington, 1 Salk. 162.) That it was decided in some of those cases, and contended in this case, that profession could not now exist, because it was not triable. That argument was not conclusive, although supported by some very high authorities. There was no doubt that the fact of profession was usually tried by the certificate of the Ordinary. But even in the old state of the law, when the doctrine of disability existed in its fullest force, it was sometimes tried by other means than by the certificate of the Ordinary. His Lordship was of opinion that the doctrine of civil death was put an end to by the statute 2 Eliz. c. 1, and that the enactments of the Emancipation Act did not warrant him in holding that the Canon Law of the Church of Rome as to profession was restored or recognized by it. His

Lordship said he *saw nothing against public policy in allowing these communities to acquire property*. He had occasion to observe on that in *M'Carthy v. M'Carthy*.

This suit was afterwards compromised by consent, which was made a rule of Court on the 17th of May, 1854.

Assuming the law as decided in *Blake v. Blake* to be incontrovertible, viz. that at the present day the doctrine of civil death is no longer applicable on the profession of a nun, it becomes important to consider whether the Legislature ought not to interfere and restore the old law. Nunneries are now allowed to exist—they are not considered contrary to public policy; ought we not therefore to afford the same protection to persons and the relatives of persons who join those communities, as experience has shown in most Roman Catholic countries to be, if not absolutely necessary, at least expedient?

It does not seem to follow as a necessary consequence, as laid down by the Lord Chancellor in the above-mentioned case, that by recognizing the doctrine of civil death, we should recognize the pre-eminence and authority of the Pope, any more than we do so by allowing the existence of such communities. It is true, that if we were obliged to try the fact of profession by the means of the certificate of a Roman Catholic bishop, there might be better grounds for the opinion of the Lord Chancellor; but his Lordship admits that profession was formerly, and of course might be now, tried by other means than by such certificate. His Lordship's objection, therefore, appears to fall to the ground; for if by allowing the existence of nunneries, we do not recognize the pre-eminence of the Pope, we certainly should not do so by proving, without the intervention of one of his bishops, that a person has joined one of such communities—the only step necessary in order to lead to the consequences of civil death, if it were now the law of the land.

According to the law as it now stands, whatever property a nun may obtain, will, by virtue of her vows of *obedience* and *poverty*, almost invariably fall into the possession of the community she has joined.

The old law of France was much wiser: according to that, the estates of persons who were professed religious did not go to the monastery, but to their heirs, or those to whom they were pleased to give them; and they could not dispose of them for the use of the monastery.—(1 Domat. by Strahan, p. 25, n.) The old law of England was similar.—(Littleton, s. 200.)

The present law is unjust, inasmuch as it gives monasteries an unfair advantage over individuals; for monasteries will doubtless succeed to the possessions of many individuals; but no

individuals can succeed to the possessions of monasteries. It is impolitic, as it has a tendency (which we have seen illustrated in this country) to cause the inmates of such communities to retain as a votary within their precincts, the heiress whom they were to educate for the duties of active life, but who, in their moments of religious enthusiasm, may have been urged to forget the ties of home and natural affection.

9. ROBINSON v. ANDERSON. 20 Beav. 98, 102.

Partnership for limited Purpose—Solicitors—Share of Profits in the Absence of Contract.

“Where two solicitors undertake a matter of business on behalf of a client, the same rule follows in that as in any other undertaking where two persons carry on a business jointly on behalf of themselves, or as agents for other persons. It is, in point of fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow, as a necessary consequence of law, that they are to be divided equally between them. And although one may do more business, and have exerted himself more than the other, yet, if nothing is said upon the subject of profits, the presumption is, that they are to be equally divided between them.”—(Per Sir J. Romilly, M.R.; see also *Webster v. Bray*, 7 Hare, 159; *M'Gregor v. Bainbrigge*, *Id.* 164, n.)

10. WING v. HARVEY. 5 De Gex, Mac. & G. 265.

Principal and Agent—Insurance Company—How far bound by Statement of Local Agent.

A person assured his life in “The Norwich Union Society,” and the policy contained a condition making it void if the assured went beyond the limits of Europe without license. He afterwards assigned the policy, and the assignee, on paying the premium to the local agent of the society at the place where the assurance had been effected, informed him that the assured was in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died. It was held by the Lords Justices, that the society was precluded from insisting on the forfeiture, and consequently that the policy ought to be treated as still subsisting.

11. HINDSON v. WEATHERILL. 5 De Gex, Mac. & G. 301.

Solicitor and Client—Gift to Solicitor by a Will drawn by himself, not set aside on ground of Presumptive Fraud.

It seems well settled, that a gift *inter vivos* from a client to an attorney may be set aside upon the ground of presumptive fraud; it being the policy of the Courts of Equity to guard against any advantage which the solicitor may take of the influence which he may acquire over his client; the actual exercise of which it would always be most difficult to prove. By a strange anomaly, however, by no means unfrequent in our law, which often delights in a distinction without a difference, it has been held in the above-mentioned case, not, indeed, inconsistently with the authorities, that a solicitor may take a gift under the *will* of his client, although the solicitor may himself have drawn the will; the onus of proving fraud, or undue influence, being thrown upon the persons contesting the validity of the gift.

This anomaly appears to arise from the fact that Courts of Equity, with respect to gifts *inter vivos*, act upon their own principles; in respect to testamentary dispositions, they consider that their validity is to be determined in other courts; that is to say, with respect to personalty, in the Ecclesiastical Courts; with respect to realty, in a Court of Common Law before a jury: and neither Ecclesiastical Courts nor Courts of Common Law presume fraud from the mere relation existing between the parties (as that of solicitor and client), although, if such relation exist, a slighter degree of proof of fraud may be requisite. The law is well stated by Dr. Lushington in *Jones v. Godrich* (5 E. F. Moore, 20), where he makes the following observations:—"The law of England has prescribed no restrictions upon testamentary dispositions, as to who may be the legatees. Where that power is exercised in favour of guardians, trustees, solicitors, medical attendants, or persons standing in a similar relation to the deceased, the degree of proof required will be greater or less according to the circumstances; but if the Court be satisfied that there was adequate capacity, testamentary intention, untainted by fraud, and a due execution, the instrument is valid. Fraud cannot be presumed; but the circumstances may render fraud so probable, that the Court will require stronger proof than in cases where all natural presumptions are in favour of the disposition, and the free will of the testator."

If the matter were considered independently of all authority, most persons would probably come to the conclusion that all

the reasons which might be urged against the validity of a gift *inter vivos*, conferred by a client upon his solicitor, would apply with still greater force in the case of a will, especially if the will were drawn by the solicitor himself.

By the Roman law, a person *qui se scripsit hæredem* could take no benefit under the will (Dig. lib. 34, tit. 8); and the same result follows in our own law, if the person be a *witness* to a will. Independently, then, of any peculiar relation between the testator and legatee, which may give the latter undue influence over the former, it certainly appears rather absurd that, while we have altered the law so as to render the evidence of an interested party admissible, we nevertheless allow a witness to take no interest under a will, while, at the same time, contrary to the Roman law, where a person has written the entire will of another, and may have given to himself the bulk of the property, he will be permitted to retain it, in absence of proof of actual fraud on his part.

12. TRUTCH V. LAMPRELL. 20 Beav. 116.

Trustee—Breach of Trust—Liability of acting Trustee, though not an active Trustee.

A person acting as trustee will not be able to escape from liability, upon the ground that he is not an active trustee, when by acting for conformity's sake he has put it in the power of his co-trustee to commit a breach of trust. Thus, where two trustees properly sold out trust-money standing in their names in Consols, and one of them handed a cheque for the proceeds to the other, who misapplied it, it was held by Sir J. Romilly, M.R., that both were liable for a breach of trust. "It is constantly," said his Honour, "argued by counsel, but the conclusion is as constantly rejected by the Court, that a person who acts is not an active trustee, and is not liable, because he has acted for conformity's sake. It is a contradiction in terms to say that a trustee who acts is not an active trustee: by taking upon himself the office of trustee, and acting, he becomes, in that transaction at least, an active trustee, and is bound properly to perform all the duties appertaining to his office."

13. MANSON V. BAILLIE. 2 Macqueen, 80.

Trustee acting as Solicitor—Professional Remuneration.

In this case, which was heard upon appeal from the first division of the Court of Session in Scotland, it appeared that six trustees had appointed one of their own body, a solicitor, to act,

with an allowance "of his necessary charges and expenses, and a reasonable gratification." He had an interest in the estate; those who appointed him had none. It was held by the House of Lords, affirming the decision of the Court below, that the trustees who had made the appointment were not responsible for the expenses incurred by the solicitor in attempting to realize the property for his own benefit, and that he was not to be absolved from all participation in that responsibility. Lord Brougham, in giving judgment, observed, with regard to the case of *Craddock v. Piper* (1 Mac. & Gord. 664), decided by Lord Cottenham, that "if that case had been at all adopted in any of the decisions of the House, he should be very slow to express any doubt which he might have upon it; but if it had never been so adopted or countenanced in decisions there, then he might be permitted to state that he had great doubts respecting the soundness of that decision to the length to which it went."

14. WYTHES v. LEE. 3 Drew. 396.

Vendor and Purchaser--Purchaser's Lien for prematurely-paid Purchase-money.

In this case, the question arose upon demurrer, whether a purchaser, having entered into a contract to purchase an estate, and paid the purchase-money, or any part of it, and the contract afterwards went off, he had a lien upon the estate for the purchase-money so paid which he could enforce in Equity, in the same manner as a vendor claiming a lien for unpaid purchase-money; and it was held by Sir R. T. Kindersley, V.C., that a bill filed by a purchaser claiming a lien for the deposit, repudiating the contract, and praying the delivery up of the contract, was not demurrable. "Suppose a person," said his Honour, "absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part-payment of the purchase-money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off, and cannot be completed, has the purchaser a lien on the estate for his deposit? That is a most important question. If there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill.

"Now that question I have looked at in three different points of view. First, with reference to natural justice, irrespectively of any specific rule of law; and it does appear to me that it is consistent with natural justice, that if a purchaser, on the faith of the contract being completed, and the estate becoming

his, has advanced money in payment, or part-payment, for the purchase, he has advanced it under circumstances which entitle him to say, 'If you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the estate.'

"Secondly, with reference to the general law of this Court,—I do not mean with reference to decided cases, but to the general law and principles of this Court,—this is clear, that the *vendor*, if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the *purchaser*, if the contract goes off, stand in principle on the same footing as that of the *vendor*? The only distinction that occurs to me is this:—The *vendor*, when he contracts to sell his estate, is owner,—he has the estate in his own possession, at least under his own control, and when he contracts to sell, his right is to say, 'I will convey the estate when the purchase-money is paid, but till that is done I will not convey it.' That right creates a lien of itself, very analogous to the Common Law lien; and that lien, which exists before conveyance, still continues; it is not a new, but the same lien. But with regard to the *purchaser*, he has not the estate in his possession, and his lien is not in its origin the same sort of lien as that of the *vendor*. But when a contract is made, and then goes off, it appears to me that, in principle and justice, the equity of the *purchaser* to a lien on the estate ought to stand on as good a footing as the lien of the *vendor* after conveyance. A difficulty has been suggested, that with regard to a *vendor*, by taking an additional security for the purchase-money, as a general rule, he loses his right to his lien, and a *purchaser* does not. The ground of the distinction I am at a loss to understand. But, however that may be, it appears to me that, on the principles of equity and justice, the *purchaser*, when the contract goes off, has a lien.

"Then the third point of view is with reference to the authorities; and it appears to me that they are in favour of the lien. Besides some two or three *dicta* which have been referred to, the leaning of which is to some extent to support the doctrine of lien, we have in *Burgess v. Wheate* a clear enunciation of the proposition that such an equity does exist. In that case, Sir Thomas Clarke said: 'Where conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser.'" His Honour, after referring to

Mackreth v. Symons (15 Ves. 345), where the doctrine of Sir Thomas Clarke was quoted without disapprobation, and to Lord St. Leonard's opinion, in his work on Vendors and Purchasers (2 Sug. V. & P. 857, 2nd ed.), adds: "I do not see what mischief could result from entertaining a bill for the single purpose of establishing the right to a lien for the deposit; and if it were necessary for me now to determine the question of the right to a lien, I should feel great difficulty in getting over the authorities on the subject,—the *dictum* in *Burgess v. Wheate*, the observations of Lord Eldon in *Mackreth v. Symons*, and the opinion of Lord St. Leonard's, especially as I think natural justice is strongly in favour of the doctrine."

15. JENKYN V. VAUGHAN. 3 Drew. 419.

Voluntary Settlement by Person indebted—Fraudulent against Creditors under 13 Eliz. c. 5—Bill filed by Person becoming a Creditor subsequent to Voluntary Settlement.

It was held in this case, by Sir R. T. Kindersley, V.C., that a creditor whose debt accrued *subsequently* to the execution of a voluntary deed may file a bill for the purpose of setting it aside, if any of the antecedent debts remain unsatisfied.

II.—POINTS DETERMINED IN THE COURTS OF COMMON LAW.

By ALEXANDER PULLING, Esq., Barrister-at-Law.

COURTS.	REPORTS.
Queen's Bench	} 4 Ellis & Bl. Part 4. } 5 Ellis & Bl. Part 1-2.
Common Pleas	17 Common Bench, Parts 2, 3.
Exchequer	11 Exchequer, Part 2.

1. Agent and Principal—Contract—When it binds Agent personally.
 2. Attachment under Common Law Procedure Act, 1854, s. 61—Garnishee—Meaning of word "Debt." 3. Attachment—Executor of Judgment Creditor not entitled to attach Debts till he has made himself a Party to the Judgment. 4. Arbitration—Validity of Agreement to refer Prospective Disputes. 5. Bankrupt—What passes to Assignees—Assignment of Materials to be used in Building a Ship. 6. Clergy—Stat. 1 & 2 Vict. c.

106, ss. 29, 31—Contract by Spiritual Person in the course of Trade in which he is engaged. 7. Corporation Aggregate—Liability of, on Contract not under Seal. 8. Corporation created by Statute—*Ultra Vires* Doctrine. 9. Costs—Taxation—Special Case—Authority of Superior Court to direct Review of Taxation where Decision reversed by Court of Error. 10. County Court Jurisdiction—Nuisance Removal Act, 11 & 12 Vict. c. 123—Title to Lands. 11. Election Expenses—Who is an “Agent for Election Expenses” within the 17 & 18 Vict. c. 120, s. 16. 12. Evidence—Declaration of deceased Tenant against his Landlord’s Right. 13. Libel—Privileged Communication—Province of Judge. 14. Practice—Compulsory Reference—Power of the Judge to refer “Matters of Account” under the 3rd sect. of the Common Law Procedure Act, 1854. 15. Practice—Equitable Defence—What admissible. 16. Practice—Inspection of Document—Affidavit—Discovery. 17. Public Body—Contracts by, in pursuance of Act of Parliament—Clerk to Trustees. 18. Mining Shares—No implied Contract on the part of a Purchaser to indemnify the Seller against Calls in respect of. 19. Sale of Goods—Property and Right of Possession, how passed. 20. Stamp—Objection as to Sufficiency of Stamp cannot be reserved for the Opinion of the Court. 21. Waste—Inclosure by Tenant—Presumption—Description of adjoining Waste.

1. **LENNARD v. ROBINSON.** 5 Ellis & Bl. 125.

Agent and Principal—Contract—When it binds Agent personally.

This was an action on a charter-party, whereby it was agreed between the plaintiff, owner of the ship *N.*, then at Genoa, and Robinson and Co., of London, merchants, that the ship should proceed to Torrevieja, and there load, from the factors of the said merchants, a cargo, “to be brought to, and taken from alongside, at merchants’ risk and expense, which the said merchants hereby bind themselves to ship;” and should proceed to Memel, and deliver, on paying freight: “thirty running days to be allowed the said merchants” for loading and discharging, and ten days for demurrage, at 4*l.* per day. The charter-party was signed “by authority of, and as agents for, Mr. A. H. Schwedersky, of Memel,”—Robinson and Co.

The declaration set out the charter-party, and averred that Schwedersky was a foreigner, not a subject of this realm, residing beyond the seas, to wit, at Memel, and claimed from defendants demurrage and damages for detention *ultra*. The defendants pleaded that the agreement was entered into by defendants by the authority of, and for, and on behalf of, and as agents for, Schwedersky, and not otherwise; and he was named to, and known by, plaintiff, as being defendants’ principal at the time the agreement was made. On demurrer, the Court of Queen’s Bench gave judgment for plaintiff, the terms of the charter-party showing that defendants contracted personally.

2. KENNETT V. WESTMINSTER IMPROVEMENT COMMISSIONERS.

11 Exch. 849.

Attachment—Common Law Procedure Act, 1854, s. 61—Garnishee—Meaning of word "Debt."

The Westminster Improvement Commissioners, incorporated by Act of Parliament, for the purpose of effecting certain improvements in Westminster, were empowered to borrow money on bond, and to advance money to builders for building purposes. By the condition of these bonds, all the bondholders were to be paid *pari passu*.

The Commissioners advanced a certain sum to one Mackenzie, a builder, under the provisions of these Acts. The plaintiff sued the Commissioners on one of their bonds, and they suffered judgment by default; and thereupon the plaintiff attached the debt due from Mackenzie to the Commissioners; but the Court of Exchequer held that the debt in question was not such a debt as could be attached under the 61st section of the Common Law Procedure Act, 1854, for the plaintiff could not enforce immediate payment of his judgment, and the effect of the *garnishment* would be to give him a priority over the other bondholders.

3. BAYNARD V. SIMMONS. 5 Ellis & Bl. 59.

Attachment—Executor of Judgment Creditor not entitled to attach Debts, till he has made himself a Party to the Judgment.

In this case, the plaintiff having died after judgment obtained, his executor proceeded, under sect. 61 of the Common Law Procedure Act, 1854, to attach a debt due to the defendant, without making himself a party to the judgment; but the Court of Queen's Bench held that this could not be done, and held the attachment bad.

4. LIVINGSTON V. RALLI. 5 Ellis & Bl. 132.

Arbitration—Validity of Agreement to refer Prospective Disputes.

This was an action on a contract, containing, *inter alia*, a prospective agreement, that if any difference should arise between the parties, it should be referred to arbitration. The declaration averred that a difference arose, and that the defendant refused to refer it.

The question as to the validity of this agreement being raised on demurrer, the Court of Queen's Bench held that the action lay.

5. **BAKER v. GRAY.** 17 Com. B. 462.

Bankrupt—What passes to Assignees—Assignment of Materials to be used in Building a Ship.

This was an action of trover by the plaintiffs, as assignees of a bankrupt shipbuilder, to recover certain ship-building materials converted to their own use by the defendant.

The bankrupt had, in consideration of certain periodical payments, agreed to build a ship for the defendant, to be launched on or before the 31st of July, 1853. The agreement contained a proviso, that in case Young (the bankrupt) should fail to complete the ship, according to the covenants and stipulations thereinbefore contained, it should be lawful for the defendant to enter upon and take possession of the ship (which, from and after the payment of the first instalment, should be, and be deemed and continue to be, as soon as the ship should be commenced, in every respect, and for every purpose, the property of the defendant); and it should be lawful for the defendant to cause the works thereby agreed to be done, to be completed by any person whom he should see fit to employ therein,—*using such of the materials* of the bankrupt as should be applicable to the purpose, &c. ; the bankrupt to repay to the defendant so much as he should expend thereon in excess of the contract price.

The bankrupt having failed to complete the ship by the stipulated time, the defendant took possession of her, and (after an act of bankruptcy committed by the bankrupt) proceeded to finish her, using therein certain materials which were in the yard, and were suitable, but had not been specifically appropriated by the bankrupt to the ship. Some of these materials had been selected by the defendant before the bankruptcy, and some were placed within the carcass of the ship, the remainder in a shed alongside ; but none of them *had actually been used* by the defendant before the bankruptcy.

The Court of Common Pleas held that the assignees were entitled to recover against the defendant the whole value of these materials.

6. **LEWIS v. BRIGHT.** 4 Ellis & Bl. 917.

Clergy—Stat. 1 & 2 Vict. c. 106, ss. 29, 31—Contract by Spiritual Person in the course of Trade in which he is engaged.

It was laid down by the Court of Queen's Bench in this case, that where a clergyman engages in trade, contrary to the provisions of stat. 1 & 2 Vict. c. 106, s. 29, and makes a contract,

in the course of such trade, such contract may, under the proviso in sect. 31, be enforced either against, or by, the clergyman, though both parties contract with knowledge of the facts constituting the illegality.

7. AUSTRALIAN ROYAL MAIL STEAM NAVIGATION COMPANY v. MARZETTI. 11 Exch. 228.—HENDERSON v. AUSTRALIAN MAIL STEAM-PACKET COMPANY. 5 Ellis & Bl. 709.

Corporation Aggregate—Liability of, on Contract not under Seal.

The plaintiffs in the first of these actions are a company incorporated for the purposes of conveying mails, passengers, and cargo between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such other matters as might be incidental to such undertaking; and the action was brought on a parol contract between the plaintiffs and the defendants, for the supply by the latter to the company of the ale in question. The ale was duly delivered and paid for by the plaintiffs, but turned out to be unfit for use.

The Court of Exchequer held that the defendants were liable, although the contract was not under the seal of the company.

The Australian Royal Mail Steam Navigation Company are incorporated for the purposes of trading as shipowners, and one of their ships being at Sydney, supposed to be unseaworthy and uninsurable, the plaintiff undertook a voyage there, to endeavour to bring her home, and the company promised, by parol, to pay his expenses, make him a further allowance of 50*l.* a month whilst away, and pay him further remuneration.

An action having been brought for breach of this agreement, the question of the liability of the company was raised on the pleadings, and the Court of Queen's Bench held that the corporation, being incorporated for a special purpose, as a trading company, was bound by the contract, as being made in furtherance of the purpose of their incorporation, though not under seal.

. In this case, Mr. Justice Crompton intimated that the decision conflicted with the decision of the Court of Exchequer in *Diggle v. London and Blackwall Railway* (5 Exchequer, 442), and wished, for that reason, that the plaintiff should have been driven to the Court of Error; but the Court were unanimous upon the point before them, as to the contract not requiring the common seal.

8. **BOSTOCK V. NORTH STAFFORDSHIRE RAILWAY COMPANY.**

4 Ellis & Bl. 798.

Corporation created by Statute—Ultra Vires Doctrine.

A company was incorporated by statute, for the purpose of making a canal for inland navigation. Powers were given to acquire lands compulsorily, which by the Act were to vest in the company in fee-simple, "to and for the use of the said navigation, but to or for no other use or purpose whatsoever." By a subsequent Act, the Canal Company were authorized to acquire lands, subject to the same restrictions, for the purpose of constructing an extension of the navigation and a reservoir. The Acts reserved to the proprietors of the purchased lands the minerals, and the right of fishing in the waters over their respective lands, and a right to use pleasure-boats over the whole canal and reservoir.

The Acts forbade the Canal Company erecting buildings on the lands, and exercising some other specified acts of ownership, but contained no express provision against the company using pleasure-boats.

Under these Acts a lake was formed, as a reservoir, on land conveyed to the Canal Company in fee-simple. By subsequent Acts, their property and rights were vested in the defendants, for the purpose of their railway. A case was sent from Chancery to the Court of Queen's Bench, in which the questions were, whether the defendants could lawfully let out boats for hire on the lake or reservoir, and whether they could lawfully use the lake or reservoir for any other purpose than supplying the navigation with water. The Court differed in opinion.

Erle, J., answered both questions in the affirmative, holding that the creation of a corporation for a specific purpose gave it all the rights incident to a corporation, with a superadded duty to fulfil that specific purpose, but without restrictions, other than those expressly, or by necessary implication, imposed by the Legislature; and that, there being nothing in the use of pleasure-boats inconsistent with the duty of keeping up the navigation, there was nothing to take away from the defendants the right to use them, that being a right incident at common law to their tenancy in fee-simple of the land covered with water.

Coleridge, J., and Wightman, J., answered both questions in the negative, on the ground that the company was created for a specific purpose, and was authorized to take and use lands for that purpose only.

Lord Campbell, C.J., without deciding what might be the

general rights of a company incorporated for specific purposes, held that, under these Acts, this company had no right, as against the representatives of those from whom the lands were originally purchased, to use the lands in any way other than for the purposes of the navigation, if such use was prejudicial to these persons. And he answered the questions, with this qualification, in the negative.

9. ELLIOTT V. BISHOP. 11 Exch. 321.

Costs—Taxation—Special Case—Authority of Superior Court to direct Review of Taxation where Decision reversed by Court of Error.

A special case was stated under the 46th section of the "Common Law Procedure Act, 1852," in which the question was, whether the plaintiff had a right to sell to the defendant certain tenant's fixtures and trade fixtures. The Court gave judgment for the plaintiff for the value of the trade fixtures, and for the defendant as to the tenant's fixtures. The Master, on taxation, allowed the plaintiff the general costs of the cause, deducting therefrom the costs of the defendant in respect of that part on which he had succeeded. The defendant took proceedings in error, and the Court of Error reversed the judgment for the defendant, and affirmed the judgment for the plaintiff, and increased it by the value of the tenant's fixtures, but made no mention of costs. The Court of Exchequer held, that this Court had no power to direct the Master to review his taxation, by allowing the plaintiff his costs of the proceedings below, and disallowing those of the defendant; but that the costs must be taxed according to the judgment of the Court of Error.

10. THE GUARDIANS OF THE POOR OF THE HERTFORD UNION
V. KIMPTON. 11 Exch. 295.

County Court Jurisdiction—Nuisance Removal, &c., Act, 11 & 12 Vict. c. 123, s. 3—Title to Land.

In this case a plaint had been entered in the County Court of Hertfordshire to recover the amount paid for carrying into force an order of two justices, under 11 & 12 Vict. c. 123, to abate a nuisance; and a *certiorari* having issued at the defendant's instance to remove the proceedings into the Court of Exchequer, on the ground that the title to the *locus in quo* was disputed, that Court quashed the *certiorari*, and held, in accordance with *Reg. v. Harding* (2 Ellis & Bl. 188), that the County Court had, by sect. 3 of the above statute, exclusive jurisdiction,

inasmuch as the remedy given by the Legislature was one given only so as to be enforced in a specified manner, and performance could not be enforced in any other manner.

11. GRANT V. GUINNESS. 17 Com. B. 190.

Election Expenses—Who is an “Agent for Election Expenses” within the 17 & 18 Vict. c. 120, s. 16.

This was an action brought by a parliamentary and election agent for the personal expenses incurred by himself on behalf of the defendant at the Barnstaple election, consisting, *inter alia*, of hotel-bills, railway-fares, and the like. The defendant pleaded the Corrupt Practices’ Prevention Act, 1854 (17 & 18 Vict. c. 102). The jury having returned a verdict for the amount of those expenses, the Court of Common Pleas held the verdict right, on the ground that the “agent for election expenses,” duly appointed under the 31st section, is not necessarily, without a further appointment, the *agent* to whom the bills are directed by section 16 to be sent.

12. PAPENDICK V. BRIDGWATER. 5 Ellis & Bl. 166.

Evidence—Declaration of deceased Tenant against his Landlord’s Right.

The plaintiff claimed a right of common, by prescription, in respect of a *que estate* in land, and also by thirty and sixty years’ enjoyment by the occupiers of the land. The defendant offered evidence that a deceased tenant for years of the land had declared that he had no such right in respect of the land. The Court of Queen’s Bench held that this declaration was not admissible in evidence, inasmuch as it was in derogation of the title of the reversioner.

13. COOKE AND ANOTHER V. WILDES. 5 Ellis & Bl. 328.

Libel—Privileged Communication—Province of Judge.

The defendant was Deputy Clerk of the Peace for Kent, and the plaintiffs had been, up to 1854, employed in printing the register of voters. In that year the defendant transferred the business to other printers; and having, as required by law, submitted his accounts to the Quarter Sessions, accompanied with a letter to the Committee, stating, as his reasons for ceasing to employ the plaintiffs, that they had charged *too high, upon grounds not supported by fact*; that he, the defendant, thought it his duty to report the circumstances, particularly “*as the*

character and conduct of the persons who are chiefly employed by the county as printers and stationers are involved ;” and concluded, “ Under the circumstances I have stated, it will be seen that I had no alternative but to adopt the course I have taken, rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation.”

The Court of Queen’s Bench held that the occasion was privileged, and that it was for the judge to decide that question ; that there was evidence for the jury as to express malice, from the language of the letter, and that the judge could not, therefore, on that ground, either nonsuit or direct a verdict for the plaintiffs.

14. BROWNE V. EMERSON. 17 Com. B. 361.

Practice—Compulsory Reference—Power of the Judge to refer “Matters of Account,” under the 3rd sect. of the Common Law Procedure Act, 1854.

This was an action to recover 954*l.* 9*s.* 8*d.* The declaration contained the common indebitatus counts ; and the pleas were, *never indebted*, payment, and set-off. The items were very numerous, and Cresswell, J., on an application under the 3rd section of the Common Law Procedure Act, 1854, decided that it was not competent to him to refer the whole matter in dispute, as some of the items of the account were disputed.

The Court of Common Pleas granted a rule compulsorily to refer the account to arbitration, holding that Mr. Justice Cresswell’s view of the case was erroneous.

“The power to act,” says Chief Justice Jervis, “is given by the 3rd section, ‘where the matter in dispute consists wholly or in part of mere matters of account, which cannot conveniently be tried in the ordinary way,’ and would seem to attach in every case where part only of the matter in dispute is mere account, if not limited by the subsequent words of the section, ‘that such matter, either wholly or in part, be referred.’”

“Having regard to the words thus used in different parts of the section, it may mean, that, where the matter in dispute consists wholly of matters of mere account, the whole may be referred ; and that where it consists in part of matters of mere account, such part only may be referred ; or it may mean, that, where the matter in dispute consists, either wholly or in part, of matters of mere account, the compulsory reference may be either of the whole matter in dispute, or of part only of the matter in dispute, as the Court or judge may think fit. The former seems to be the construction which was put upon the section by my brother Cresswell. The latter, in our opinion, is

the true construction. The former construction will make this part of the statute almost nugatory. The appointment of a compulsory referee, whose sole duty will be the addition of undisputed items, will be an unproductive expense; and this provision of the statute, which was supposed to be of great importance, will become a dead letter. But there are considerations arising from the section itself, and from other sections, which satisfy us that the latter is the true construction. Where the matter in dispute consists wholly or in part of matters of mere account, &c., the Court or a judge may decide such a matter—that is, the matter in dispute—in a summary manner: The words ‘wholly or in part’ do not occur a second time in this branch of the section, to limit the authority of the Court: on the contrary, they are studiously left out; and the matter in dispute—that is, the whole matter—may be decided in a summary manner, where it consists wholly or in part of matter of mere account, &c. But the same matter which may be decided in a summary manner, may, under the same circumstances, if the Court shall think fit, be referred, either wholly or in part, to an arbitrator, instead of being decided in a summary manner. And if the Court may decide in a summary manner the whole matter in dispute, where a part only consists of matters of mere account, it would seem to follow, that, in like manner, the whole may be referred, where a part only consists of matters of mere account. The repetition of the words ‘wholly or in part,’ in the second branch of the section, shows clearly that the matter to be decided or referred is the matter in dispute, and not the matters of mere account of which the matter in dispute consists; because it would be absurd to say, that, where part of the matter in dispute is matter of mere account, a part only of such matter of mere account may be referred.

“But the 4th and 5th sections lead us to the same conclusion. By the 4th section, issues of fact or law may be directed as to particular items; and, by the 5th section, the arbitrator, upon a compulsory reference, may state a case for the opinion of the Court. If the compulsory arbitrator is to be confined to the examination and addition of items of mere admitted accounts, it is difficult to imagine a case to which these sections would be applicable; for, wherever the account is not admitted in the form in which it is rendered,—for instance, where an application of a particular payment is disputed,—it ceases to be a matter of mere account, and the power to refer would not attach.

“We conclude, therefore, from these sections, that the compulsory reference was intended to include matters in dispute which might fitly be determined by an issue to be directed by

the Court, or by a case to be stated by the arbitrator, and that the authority to refer is not restricted to those cases only in which no item is disputed, and which involve mere matters of account.

“For these reasons we are of opinion that the rule ought to be made absolute.”

It does not follow from this decision that every case ought to be referred which involves matters of mere account. The rule is well laid down in the case of the *Taff Vale Railway v. Nixon* (1 House of Lords' Cases, 125), and was probably the origin of the provision now under discussion.

15. *WODEHOUSE v. FAREBROTHER.* 5 Ellis & Bl. 277.

Practice—Equitable Defence—What admissible.

This was an action on a bond of indemnity, given by the defendant to the plaintiffs, for the due performance by one Edward Martin of the covenants of a certain mortgage-deed, the payment of the premiums on a certain policy of insurance, and interest on the mortgage-money. The defendant pleaded, by way of equitable defence, that he was only surety for Martin, and that he had offered, and was still ready, to pay all that was due in equity to the plaintiffs, on receiving an assignment of the securities.

The Court of Queen's Bench held that, assuming the facts proved sufficient to entitle the defendant to relief in the Court of Chancery, yet the plea was not good under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 83), inasmuch as it disclosed no facts which entitled the defendant to unconditional relief from the obligation in equity, but only such facts as entitled him to be made secure by an assignment of the securities.—(*See Mines-Royal Societies v. Magnay*, 10 Exch. 489.)

16. *WRIGHT v. MONEY.* 11 Exch. 209.

Practice—Inspection of Document—Affidavit—Discovery.

The Court refused to grant an order for the inspection of a document upon an affidavit made by the defendant, which stated that the plaintiff's claim was for money lent to the defendant's wife; and that the first intimation which the defendant received of such claim was after the death of his wife, but on the day of her death, when the plaintiff showed the defendant an account-book, which the plaintiff stated contained accounts between himself and the defendant, and in which the

defendant believed the sum claimed was charged against him; and that he was desirous of knowing whether the money was advanced before or after his marriage with his deceased wife.

17. KENDALL v. KING. 17 Com. B. 483.

Public Body—Contracts by, in pursuance of Act of Parliament—Clerk to Trustees.

The defendant was clerk of the Committee of Visitors of the Cambridgeshire Lunatic Asylum, acting in pursuance of the 17th section of the 8 & 9 Vict. c. 126, by which a select number of the justices for a county or borough, called the "Committee of Visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c.; and section 16 enabling them to sue and be sued in the name of their clerk. The Court of Common Pleas held, that an action might be maintained against the Committee of Visitors in the name of their clerk, in respect of a contract so entered into by them, although the plaintiff might have no means of enforcing his judgment when obtained.

18. WALKER v. BARTLETT. 17 Com. B. 446.

Mining Shares—No implied Contract on the part of a Purchaser to indemnify the Seller against Calls in respect of.

A. agreed to sell to B. 500 shares in a lead-mine, and a transfer-paper in the usual form was made out in blank, signed by A., and sent to B., who kept it, but never signed his acceptance of the shares on the transfer-paper, nor ever took it to the purser of the mine to get the transfer registered; and so the shares remained on the books of the company in A.'s name.

Calls having been afterwards made in respect of the shares, which A. was obliged to pay, the Court of Common Pleas held (upon the authority of *Humble v. Langston*, 7 M. & W. 517), that no contract was to be implied on the part of the buyer either to register the shares in his own name, or indemnify the seller against any call which he might be required to pay by reason of non-registration.

19. GODTS v. ROSE. 17 Com. B. 229.

Sale of Goods—Property and Right of Possession, how passed.

This was an action of trover, to recover a quantity of rape-oil.

The plaintiff having a quantity of rape-oil at Humphrey's

wharf, contracted to sell five tons thereof to the defendant. The bought-note was as follows:—"Bought for account of Mr. W. A. Rose, of Mr. H. A. Godts, five tons of first quality foreign refined rape-oil, at 53s. per cwt., usual allowances; to be free delivered, and paid for in fourteen days, in cash, less 2½ per cent. discount."

The plaintiff sent an order to the wharf, directing the wharfinger to transfer into the defendant's name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave the plaintiff's clerk a transfer-order, addressed to the defendant, acknowledging to hold the five tons for him. The plaintiff's clerk took the invoice and transfer-order to the defendant's counting-house, and offered them to him, at the same time demanding a cheque for the amount. The defendant, without (as the jury found) the consent of the plaintiff's clerk, took the transfer-order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to the defendant. In defiance, however, of this notice, the oil was afterwards delivered.

The Court of Common Pleas held that, under the circumstances, neither the property, nor the right to the possession thereof, passed to the defendant.

"If it were necessary," says Mr. Justice Willes, "to pronounce an opinion upon the construction of the contract, I should have little hesitation in holding it to be, that the seller should have the option of the time of delivery, and that then the buyer should have the goods only upon payment of the price. I, however, proceed upon this ground, that the property in the oil was in the seller at the time of the contract, and that nothing which took place between him and the buyer had the effect of taking that property out of the former, and vesting it in the latter. This was not a contract for the sale of any specific and ascertained parcel of oil; but for five tons out of any oil of the character specified. The contract is simply a contract for the sale of five tons of oil of the description therein mentioned. Now, when one man sells to another goods which are not specifically defined, it is necessary that they should agree upon what is to be delivered in fulfilment of the contract. The seller has the option of delivering, and the buyer of accepting, goods of the kind mentioned, subject to their being of the quality contracted for. In the present case, the seller, for the purpose of doing this, selects certain casks of oil as the oil which he tenders to answer the contract on his part; and he sends his clerk to the wharfinger with an order to him to hold these par-

ticular casks for the buyer, which the wharfinger assents to do. Still, however, there is no assent on the part of the buyer. The seller's clerk then goes to the buyer, and, producing the transfer-order he had obtained from the wharfinger, offers to give it to him, subject, however, to the condition that he shall receive a cheque in return. The buyer takes the transfer-order, but declines to give the cheque; he does not assent to the appropriation of the particular casks of oil, as a fulfilment of the contract, upon the terms upon which alone the seller was content to make it. There was no agreement *ad idem*, as to the appropriation, and consequently no property passed. The law upon the subject of the passing of the property in goods by appropriation is well laid down by Parke, B., in *Dixon v. Yates* (5 B. & Ad. 34), where he observes upon a note of my brother Manning. 'I take it to be clear,' said the learned judge, 'that, by the law of England, the sale of a specific chattel passes the property in it to the vendee, without delivery. The general doctrine, that the property in chattels passes by a contract of sale to a vendee without delivery, is questioned in *Bailey v. Culverwell* (2 M. & R. 566), in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is, to vest the property in the bargainee.' The property in goods not specific, therefore, certainly does not pass to the vendee until he assents to the appropriation made by the vendor, and upon his terms. An essential ingredient was wanting, — viz., payment. If the seller had no right to impose that condition, the buyer might have had his remedy by action. But, no property passing, the plaintiff retained his right to the oil, and consequently is entitled to a verdict."

20. *SIORDET v. KUCZYNSKI*. 17 Com. B. 251.

Stamp—Objection as to Sufficiency of Stamp cannot be reserved for the Opinion of the Court.

This was an action on a bill of exchange, and at the trial, before Mr. Justice Cresswell, a question arose, under 17 & 18 Vict. c. 83, as to the stamp. The learned judge ruled that the bill was properly stamped, and admissible; but at the request of counsel, reserved the point for the opinion of the Court. A rule having been obtained accordingly, was discharged, the Court of Common Pleas holding, that, under the 81st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the question whether or not a document offered in evidence is sufficiently stamped, is to be decided by the judge at *Nisi Prius*, and cannot properly be reserved for the opinion of the Court.—(See also *Tatterseall v. Fearnley*, 17 C. B. 368.)

21. *KINGSMILL v. MILLARD*. 11 Exch. 313.

Waste—Inclosure by Tenant—Presumption—Description of adjoining Waste.

This was action of ejectment. The land sought to be recovered had been inclosed from the waste adjoining the highway, by one Sheppard, from whom the defendant claimed, and who was lessee for three lives under the plaintiff's ancestor, of certain premises, described as "all that cottage or tenement, with the garden thereto adjoining and belonging, situate, &c.; and also a piece or parcel of land lying near to the said cottage or tenement, containing, by estimation, three quarters of an acre (more or less), lately used as garden-ground." The portion inclosed consisted of an adjoining piece of waste land not theretofore used as an outlet of the garden.

The Court of Exchequer held that the waste land did not pass under the description in the lease, but that the presumption was, that the encroachment made by the tenant was annexed to the holding under the lease.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the LAW MAGAZINE AND LAW REVIEW, will henceforth be noticed—either shortly, or at length—in its pages.]

Precedents in Conveyancing, with Dissertations on its Law and Practice. By Frederick Prideaux, Esq., Barrister-at-Law. Second Edition. London: Wildy and Sons. 1856.

THIS collection of Precedents is in good repute amongst conveyancers and those who have to concern themselves with the transfer of realty or the preparing of wills. It is unnecessary to comment at length upon a work which has already stood the test of criticism; but we deem it only fair to state that the author's desire on this occasion "has been to condense into one volume as much of the law and practice of Conveyancing as possible;" and with this view he has "added to the precedents several short dissertations, which may enable the reader to satisfy himself at a glance on many points without further research. The precedents, however, form the chief feature of the work, and in their preparation care has been taken to render each as simple and at the same time as complete as practicable." We think that this collection of forms may safely be recommended to the Profession.

The Practical Conveyancer. By Rolla Rouse, Esq., Barrister-at-Law. London: Butterworths. 1856.

THE plan of this work is different from that adopted by the author of the collection of Precedents last noticed. The course pursued by Mr. Rouse has been first to present to the reader an outline of the draft of a conveyance, mortgage, or lease, and then to fill up the various clauses which require to be inserted in it; arranging also under consecutive heads, according to the order in which they naturally occur in the deed, the variations which may be necessitated therein by circumstances, as regards either the conveying parties, the parties to whom the conveyance is made, the consideration, the form of conveyance, or parcels and estate conveyed. By following out this plan, the author is enabled to compress within very moderate limits, and to offer at a very moderate price, not fewer than 365 precedents of conveyances, mortgages, and leases, together with a collection of miscellaneous forms, which cannot fail to be of great utility to an adroit practitioner, who has *well studied* and carefully considered *a priori* the arrangement of the work before him. There is a full table of contents prefixed to the volume, which will much assist towards mastering its details.

The Statutes for the Relief of Insolvent Debtors, with Notes of the Decisions thereon, &c. By Leonard Shelford, Esq., Barrister-at-Law. London: Maxwell. 1856.

THIS volume contains not only the Statutes for the Relief of Insolvent Debtors, but also the Rules of the Insolvent Court, and the forms used both in proceedings for discharge from imprisonment and for protection from process. The plan adopted in this, as in some other similar works by Mr. Shelford, is very convenient for the practitioner. Under each section of the Act which he annotates, are arranged the cases (if any) bearing upon it, together with explanatory comments, carefully and skilfully prepared. A good index adds greatly to the value of this book.

Having very frequently consulted with advantage Mr. Shelford's treatises and editions of important statutes, we gladly avail ourselves of this opportunity to bear testimony to their great accuracy, and generally to the excellence of their arrangement.

Besides the above works, and some others which demand lengthened comment,¹ we have received the following books and pamphlets :—

The Influence of Christianity upon International Law, being the Hulsean prize essay for the year 1854, by C. M. Kennedy, B.A. Cambridge: M'Millan and Co. 1856.—An Inaugural Lecture on the Study of the Law, &c., by Professor Norton. Madras: Pharoah and Co. 1855.—Tables of Investment, Interest, and Commission, by Andrew Wylie. London: Letts and Co.—Papers Read before the Juridical Society. Part II. London: Stevens and Norton. 1856.—Public Prosecutors, by an Attorney and Solicitor. London: Simpkin, Marshall, and Co.—The Present Crisis in Administrative Reform, by J. P. Gassiot, F.R.S. Smith and Elder. 1856.—The Appellate Jurisdiction of the House of Lords in Appeals from Scotland, by Alexander M'Neill, Esq., Barrister-at-Law. London: Butterworths. 1856.—To some, or all of which, as opportunity may present itself, we shall refer hereafter.

¹ We allude particularly to "Tudor's Leading Cases on Real Property and Conveyancing;" "Smith's Compendium of the Law of Real and Personal Property connected with Conveyancing;" and Mr. Phillimore's "Treatise on the Principles and Maxims of Jurisprudence."

Events of the Quarter.

MISCELLANEOUS.

The Right Hon. Spencer Horatio Walpole has accepted the office of Archbishop's Church Estates Commissioner, vacated by the decease of Mr. Goulburn.

We observe that, in an action for libel brought against Mr. Marshall, the Judge of the County Court at Leeds, by Mr. Barrett, a solicitor practising before him, a verdict with 40s. damages has passed for the plaintiff. Has the eye of the Lord Chancellor rested upon the report of the case alluded to?

APPOINTMENTS, &c.

We have much pleasure in recording, amongst the events of the past quarter, the appointment of Mr. Russell Gurney, Q.C., to the office of Common Serjeant, in reference to which we extract the following judicious observations from the columns of our learned contemporary the *Jurist* (March 8):—"The Corporation of London have shown that they fitly appreciate the services of their public men, by promoting this gentleman (Mr. Russell Gurney, Q.C.) to the office of Common Serjeant. This is bestowing honour where honour is most justly due. Mr. Gurney has filled the office of Judge in the Small Debts Court for the city of London, and of Commissioner in the Central Criminal Court, to the satisfaction of the public and of the Legal Profession. Our own experience enables us to speak more especially of him as Judge in the Small Debts Court—an important and arduous office, which compelled him almost daily to listen for six or seven hours continuously to numerous cases involving small amounts, but not the less fruitful in wrangling of the parties, long speeches of their professional representatives, hard and contradictory swearing, and everything that can try the temper and patience of man; but we never witnessed on the part of Mr. Gurney the slightest display of ill-temper or of impatience. On the contrary, he has ever been distinguished by a calmness and placidity of demeanour, careful and earnest attention to every part of the case brought before him, and a most anxious desire to do justice between the litigant parties. We remember Mr. Gurney acting as a Judge on the Oxford Circuit, after the sudden death of Mr. Justice Talfourd, and he discharged his onerous and important duties in a manner that won great and general approbation, not only from the public but also from the Bar. He tried civil causes of considerable importance, and among other criminal cases the charges of forgery and perjury against the mock Sir Hugh Smythe. While congratulating Mr. Gurney upon his new appointment, we cannot

help feeling that he is worthy of a higher post, where his learning, abilities, and high judicial qualities may be exercised in a wider sphere than that of a merely Criminal Court. Of course it is of the utmost importance to have first-class men presiding over such a tribunal as that to which he will now exclusively devote himself; but while there are several, perhaps many, members of the Bar capable of discharging the functions of the office to which he has been elevated, there are very few who can so well fulfil the duties of a Judge in determining the more complicated and difficult questions which affect the civil rights and liabilities of suitors, or so well preserve judicial dignity, combined with patience, courtesy, and kindness of heart."

Mr. Prendergast, Q.C., Recorder of Norwich, has been elected to the judgeship of the Sheriffs' Court of London.

Mr. Serjeant Miller, of the Midland Circuit, has been appointed to the judgeship of the County Court for the Leicester district, vacant by the death of J. D. Burnaby, Esq.

H. S. Selfe, Esq., barrister, of the Oxford Circuit, has been appointed a magistrate at the Thames Police Court; and G. M. Dowdeswell, Esq., of the same circuit, has been appointed Recorder of Newbury, in place of Mr. Selfe.

John Gordon, Esq., barrister-at-law, of the Oxford Circuit, has recently been appointed a Master of the Court of Common Pleas, to fill the vacancy caused by the retirement of Edward Griffith, Esq.; and J. T. Airey, Esq., has, we understand, been appointed an Assistant-Master in the same Court.

Thomas Sneyd Kynnersley, Esq., barrister, of the Oxford Circuit, has been appointed Stipendiary Magistrate for Birmingham. It is understood that the names of three barristers, candidates for this office, were selected by the Town Council of Birmingham, from whom Mr. Kynnersley was nominated by the Home Secretary.

Mr. Keogh, Attorney-General for Ireland, has been raised to the Judicial Bench, to fill the vacancy caused thereon by the death of Mr. Justice Torrens. Consequent upon this elevation is that of Mr. J. D. Fitzgerald to the Attorney-Generalship, and the promotion of Mr. Christian, Q.C., to the Solicitorship for Ireland.

E. Clements, Esq., barrister-at-law, has been appointed sole Commissioner for inquiring into the remaining turnpike trusts in Ireland, in the room of Mr. Hayward, Q.C.

JUDICIAL CHANGES AND APPOINTMENTS IN CANADA.—The Hon. William Henry Draper, C.B., one of the Justices of her Majesty's Court of Q.B., to be Chief Justice of her Majesty's Court of C.P. in Upper Canada.—The Hon. Archibald Maclean, one of the Justices of her Majesty's Court of C.P., to be one of the Justices of her Majesty's Court of Q.B. in Upper Canada, with precedence from the 28th December, 1887.—John Hawkins Hagarty, Esq., one of her

Majesty's Counsel in Upper Canada, to be one of the Justices of her Majesty's Court of C.P. in Upper Canada.

Sir William A'Beckett has been appointed Judge of the Vice-Admiralty Court of the colony of Victoria.

T. H. Stirling, Esq., late Attorney-General at Hong Kong, has been appointed puisne Judge of the Supreme Court of Ceylon.

The Hon. Mr. Harding has been appointed Recorder of Natal.

H. J. Meller, Esq., has been appointed Crown Prosecutor at Natal.

The Queen has been pleased to appoint John Harvey Darrell, Esq., to be Chief Justice, Duncan Stewart, Esq., to be Attorney-General, and Seth Harvey, Esq., to be Solicitor-General for the Bermudas; and James R. Holligan, Esq., barrister-at-law, to be Auditor of Public Accounts for the island of Barbados.

The Queen has been pleased to appoint John Lucie Smith, Esq., to be Attorney-General for the colony of British Guiana; and Thomas Worthington Barlow, Esq., to be Queen's Advocate for the colony of Sierra Leone.

APPOINTMENTS OF QUEEN'S COUNSEL AND SERJEANTS.

H. M'Calmont Cairns, Esq., M.P. (of the Middle Temple), and C. J. Selwyn, Esq. (of Lincoln's Inn), have been appointed Queen's Counsel.

The under-mentioned gentlemen have been called to the degree of the Coif:—Messrs. Hayes (of the Midland Circuit), Wells (of the Norfolk Circuit), and Pigott (of the Oxford Circuit). They gave rings with the motto, *Cedant arma togæ*.

CALLS TO THE BAR.¹

January 26.

LINCOLN'S INN.—Clement Tudway Swanston, Martindale Edwin Vale, Francis Vaughan Hawkins, Henry Deune, Henry Oliver Barker, George Valentine Yool, William B. D. D. Turnbull, Arthur Townley Watson, Robert T. Gurdon, William Lloyd Cabell, John Marshall Hayman, George Gwyn Elger, Bingham Arthur Ferard, Andrew Richard Scoble, Cecil Henry Russell, John Charles Wilson, and William Norton Lawson, Esqrs.

INNER TEMPLE.—T. Henry Baylis, M.A., Fred. C. J. Millar, B.A. (Certificate of Honour and Studentship), James Bevan Bowen, M.A., Edmund Christian Law, B.A., Fred. Hyman Lewis, Benjamin Leigh Smith, Edgar Skipper, LL.B., Chas. Wentworth Walker, B.A., William Brandt, B.A., and Richard Hambly Andrew, Esqrs.

¹ This list of Calls to the Bar was not forwarded in time for the February number of the *Law Magazine*.

MIDDLE TEMPLE.—Robert Marshall Straight, Henry Gawtrees, John Dickie, Thos. Henry Derbishire, William Thos. Image, B.A., Thos. Eyre Foakes, Henry Gardner, and John Richard Andrews, Esqrs.

GRAY'S INN.—Hampson William Whitmarsh and William Andrews Holdsworth, Esqrs.

NECROLOGY.

January.

- 4th. HENDERSON, William, barrister-at-law, aged 34.
- 16th. WAUGH, George, Esq., solicitor, London, aged 55.
- 29th. SMITH, Henry George, Esq., solicitor, London, aged 34.
- 30th. WRIGHT, William, Esq., Chief Clerk of Enrolment in Chancery, aged 68.

February.

- 1st. PEARSON, Henry, Esq., barrister-at-law, the talented editor of Mr. Chitty's (junior) "Precedents of Pleadings," aged 47.
- 1st. WOODMAN, James Linning, W. S., Edinburgh.
- 2nd. RANSOM, Robert, Esq., solicitor, Sudbury, aged 59.
- 13th. MENZIES, Allen, Esq., W. S., Professor of Conveyancing in the University of Edinburgh.
- 14th. WRIGHT, Thomas Skeeles, Esq., solicitor, London, aged 37.
- 15th. MEYNELL, Edward, Esq., barrister-at-law, Leeds, aged 45.
- EMLY, Henry, Esq., barrister-at-law, London, aged 66.
- 16th. Sir John STODDART, Knight, Chief Justice of Malta, and Judge of the Admiralty Court there, aged 85.
- 19th. ALLNUTT, Zachary, Esq., solicitor, aged 83.

March.

- 8th. GROVE, Charles Houlton, Esq., barrister-at-law, London, aged 48.
- 12th. At the Grove, Camberwell, the Hon. Robt. Rutledge CRAIG, her Majesty's Attorney-General and Queen's Advocate of British Guiana.
- 14th. ROBESON, William, Esq., solicitor, Bromsgrove, Worcester-shire, aged 71.
- 28th. HASTINGS, William Warren, Esq., solicitor, London, aged 64.
- 31st. OWEN, John, Esq., solicitor, Manchester, aged 62.

April.

- 3rd. SANDERS, Robert Muriel, Esq., solicitor, London, aged 32.
- 10th. DUNCAN, J. B., Esq., barrister-at-law, London, aged 40.
- 12th. HOLMES, Richard, Esq., solicitor, Arundel, aged 70.

We are requested to state that the designation of "barrister" was erroneously appended to the name of Mr. Henry Revell Phillips, whose name appeared in the Necrology of the February number of the *Law Magazine*.

List of New Publications.

Abbott—A Treatise on the Law relative to Merchant Ships and Seamen. By Charles Abbott (Lord Tenterden). Tenth Edition. By Mr. Serjeant Shee. Royal 8vo. 32s. cloth.

Amos—Ruins of Time, exemplified in Sir Matthew Hale's "History of the Pleas of the Crown." By A. Amos, Esq., Barrister. 8vo. 8s. cloth.

Archbold's Summary of the Law relating to Pleading and Evidence in Criminal Cases; with the Statutes, Precedents of Indictments, &c.; the Practice relating to them, and the Evidence necessary to support them. By J. Jervia, Esq., Barrister (now Chief Justice of Common Pleas); the Thirteenth Edition, including the Practice in Criminal Proceedings generally. By W. N. Welsby, Esq., Barrister. Royal 12mo. 24s. cloth.

Archbold—The Poor Law; comprising the whole of the Law of Settlement, and all the Authorities upon the subject of the Poor Law generally, brought down to 1856; with Forms. By J. F. Archbold, Esq., Barrister. Eighth Edition. 12mo. 28s. cloth.

Archbold—The Law and Practice in Bankruptcy, as founded on the recent Statutes; the Eleventh Edition, including the latest Statutes, Cases, and Orders. By J. Flather, M.A., Barrister. 12mo. 30s. cloth.

Broom—Commentaries on the Common Law; designed as introductory to its study. By Herbert Broom, M.A., Barrister; Reader in Common Law to the Inns of Court. 8vo. 17. 11s. 6d. cloth.

Chambers—Strictures, Legal and Historical, on the Judgment of the Consistory Court of London, December, 1855, in *Westerton v. Liddell*; containing a complete Exposition of Law and Fact on the Subjects in dispute. By J. D. Chambers, M.A., Barrister. Royal 8vo. 2s. 6d. sewed.

Chitty and Temple—A Practical Treatise on the Law of Carriers of Goods and Passengers by Land, inland Navigation, and in Ships; with an Appendix of Statutes and Forms of Pleading. By T. Chitty and L. Temple, Esqs., Barristers. 8vo. 17. 18s. cloth.

Cook—An Act to Amend the Laws relating to the Construction of Buildings in the Metropolis; with Notes. By E. R. Cook, Esq., Barrister. 12mo. 2s. cloth.

Drewry—The New Practice of the Court of Chancery. By C. S. Drewry, Esq., Barrister. 12mo. 15s. cloth.

Greenwood—A Manual of the Practice of Conveyancing; showing the present Practice relating to the daily routine of Conveyancing in Solicitors' Offices: to which are added Concise Forms and Precedents in Conveyancing, &c. By G. W. Greenwood, Solicitor's Clerk. 12mo. 7s. 6d. cloth.

Harrison's Analytical Digest of all the Reported Cases determined in the House of Lords, the Superior Courts of Law, and in Bankruptcy, &c. &c.; continued from Easter, 1843, to Michaelmas, 1855. By R. A. Fisher, Esq., Barrister. Two Vols. royal 8vo. 37. 13s. 6d. cloth.

Humphreys' Manual of Civil Law, for the use of Schools; consisting of an Epitome in English of the Institutes of Justinian. By E. R. Humphreys, D.C.L. Fcp. 8vo. 3s. 6d. cloth.

Lowe—Speech of the Right Hon. R. Lowe on the Amendment of the Law of Partnership and Joint-Stock Companies, February 1, 1856. 8vo. 1s. sewed.

Lowe—Speech of the Right Hon. Robert Lowe on the Abolition of Local Dues on Shipping. 8vo. 1s. sewed.

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**ART. I.—MEMORIALS OF HIS TIME, BY HENRY
COCKBURN.**

8vo. pp. 470. Blacks, Edinburgh. 1856.

THE book of which this is the somewhat affected title, consists of what others have termed "Reminiscences of Edinburgh Society and Individuals," by Lord Cockburn, whose very indifferent "Life of Lord Jeffrey" had given him but a moderate rank among biographers; not that there was more to be urged against it than the want of judgment, which made him execute his design of exalting his subject by publishing half a volume of letters to women and children, amiable and natural no doubt, but the very last productions of his pen that Lord Jeffrey would have desired to be preserved. The political—that is the party—prejudice under which the book was written, formed another ground of complaint; and the same objection may certainly be taken to the work before us. Our office keeps us from weighing all the defects or merits of the work, unless in so far as it deals with legal subjects; and we therefore shall not stop to remark upon the favour with which it has been received by the public, and which it owes chiefly to the insatiable desire of readers to see a page filled with proper names; a desire so strong with some, that we have known a person of great learning and eminence declare he could read the "Court-Guide" with more interest than many of the books which are published.

It is, however, only fair to observe that Lord Cockburn has given an account of the times in which he lived, deserving of attention, and conducive to instruction as well as entertainment. The defects under which he labours as the historian of those times, are indeed very material in their operation upon his credit;—he is a zealous partisan, and he is a dealer in anecdotes. Both these circumstances have the same tendency; they make him, quite unknown to himself, both colour and exaggerate his facts. Although he had not become a judge when he set down the particulars which are now published under his name, it would have been well for him when he left them, apparently for publication, to reflect that after he assumed the judicial character, he must be deemed to have re-affirmed, by not altering or modifying the sentences which he had pronounced on so many individuals, as well as on bodies of men. Thus, to take but a single instance: he compares an eminent judge to the infamous, and in every way execrable Jeffries; and it goes out to the world that this was the deliberate opinion of another judge who afterwards sat in the same court.

Lord Cockburn was a person of great merit in his political conduct, because, although nearly connected with Lord Melville, his uncle by marriage, and to whose interest his father owed the place of Baron of the Exchequer, and thus certain himself of professional advancement, had his opinions agreed, or only not very widely differed from those of the Tory party, he nevertheless connected himself with the Whig Opposition, and only consented to take an office under the Tory Government of 1807, on the distinct understanding that it was given to him, not only professionally, but in consequence of his relationship to the ruling family of Dundas. He held it till 1810, when he was removed, in consequence of his opposition vote in the Faculty of Advocates. It is hardly necessary to observe, that the Whig party must have regarded the adhesion of one so circumstanced as a singular mercy; they must have deemed him “a brand snatched from the burning.” But independently of this accidental circumstance, his excellent intrinsic qualities—an amiable disposition, a strictly honourable mind, distinguished abilities as an advocate, a respectable station in the profession—

were quite sufficient to make his allies highly prize their acquisition; and it must be added, that though nowise wanting in zeal, his good judgment ever kept him from the proverbial excesses of recent conversion. Through the long night of their exclusion from office, he remained with them steadily, and when day dawned after twenty years, he became first Solicitor-General, on Mr. Murray waiving his undisputed claims, and afterwards a judge. In the literary labours of the party he took but an inconsiderable share; he only contributed a few papers of somewhat obscure fame to their great journal. But he lived in close intimacy with all those eminent men whose exertions had so important an effect in establishing the influence of liberal opinions, and building up the power of the party upon the ruins of the Melville dominion.

On this great party revolution Lord Cockburn gives pretty much the same commentary which any other of the Whig persuasion would furnish, with the exception of his reference to Lord Melville, of whom he speaks, not in the language of a relative, but in terms strictly of truth and justice; and how distasteful soever these may prove to the remaining members of the party, they will be approved by all whom factious feelings do not blind. That there prevailed in Scotland, during the latter period of Lord Melville's ascendancy, much of the illiberal, it may almost be termed the persecuting spirit, which marked the intercourse of parties, more especially in provincial situations, after the beginning of the French Revolution, cannot be denied, any more than it can be doubted, that even before these dismal times, there was considerable intolerance of adversaries exhibited by those who had the influence of the Government on their side. But that Lord Melville himself was free from all such violence, and could only be blamed for having exerted too feebly his great power over his adherents to keep them from their favourite courses, must be admitted by all who are acquainted with the character of the man, and with the facts of the case. Lord Cockburn does him justice in this respect, as well as in the more important matter of the charges brought against him, and which led to his impeachment—charges which present the most memorable instance of exaggeration, if not of absolute

invention, to be found in the whole history of faction, and which have long since been abandoned by all save the few surviving zealots of superannuated party. But Lord Cockburn omits the expression of an opinion which all must entertain who now calmly look back to the history of those times, uninfluenced by the heats formerly prevailing on both sides; we mean the reprobation due to the Government of 1807 for their spiritless conduct in shrinking from the fellowship of Lord Melville after his triumphant acquittal. Whoever reads the letters published by Mr. Twiss in his excellent "*Life of Lord Eldon*," and those given by Lord Mahon (now Lord Stanhope) as a supplement to one portion of that correspondence, while he draws inferences from both publications extremely unfavourable in some respects to Lord Eldon, in others to Mr. Pitt, will come to a conclusion most favourable to Lord Melville, whose manly understanding and truly statesmanlike views of the great questions raised by the king's objection to Mr. Fox, appear in marked contrast to the selfish and intriguing propensities of his colleague. But another opinion will be suggested by the correspondence with Lord Eldon; that the exclusion of Lord Melville from the restored Tory Government was a paltry sacrifice to fear of their adversaries in Parliament, and of the clamour which they would excite in the public. Recollecting that his son formed a part of the administration, we can only suppose that the exclusion was acquiesced in upon the speculation of a mitigation of the public prejudice enabling them afterwards to be just towards him, and consult their own best interests. The reign of clamour which soon after began in the Duke of York's case may possibly have still further postponed the accomplishment of what we are bound to presume were their wishes; the fact, however, is, that Lord Melville survived above four years the re-establishment of the Tory Ministry, and remained as much removed from power as if he had been condemned upon his trial. To this point we conceive Lord Cockburn should have plainly adverted, in defiance of his party attachments.

We have referred to the intolerant spirit of the times that succeeded the commencement of the French Revolution as not at all peculiar to Edinburgh, or in general to Scotland. Of this

Lord Cockburn appears not to have been aware, and his account of the excess to which it proceeded there, is tinged with no little colouring, and marked with considerable exaggeration. Thus when he speaks of a test being presented by the ruling powers to men on their call to the Bar, and instances one, afterwards at the very head of the profession (Mr. Cranstoun, since Lord Corehouse), as declining to give in writing his acceptance of it, and, therefore, being driven to prefer serving under a friend in his yeomanry, ordered to Ireland, we believe, from all we have been able to learn of this matter, that the written test is an invention of some party zealot who had imposed on Lord Cockburn, possibly a mistake on his lordship's part, by taking figurative expressions, or jocose caricature, literally—a mistake of which this volume presents many instances; while the military service and the Irish campaign, we have every reason to believe, originated in a reluctance to begin practice for a year or two after being called to the Bar, and a predilection for the life which was fitted to extend his knowledge of the world, under auspices peculiarly favourable to that plan. That the professional fortunes of all who in those times devoted themselves to the law, depended very much upon the favour of the ruling party, cannot, indeed, be doubted. When Lord Cockburn regards this as peculiar to the Scotch Bar, we take for granted that he never heard of such cases as that of Mr. Scarlett, kept for seven or eight years out of the rank to which he had all but a strict legal right, and this long after the first violence of party strife had passed away; or of the same thing happening to Messrs. Brougham and Denman, when all remains of such party spirit had ceased, and when, not only they, but many others, were injured in their profession, for no other reason than that these two gentlemen had honestly discharged their duty to a client whom the king chose to persecute. Nothing which Lord Cockburn, even with all his party colouring, relates of the injustice done to Scotch lawyers, is at all to be compared with this; and yet this was well known to every one, and had been again and again commented upon long before Lord Cockburn sat down to represent the reign of terror in Scotland as unexampled in all its particulars anywhere else. We have taken these three

instances, because his lordship, and those to whom his Reminiscences are particularly addressed, must have been most familiar with them. But the history of the English Bar, both in London and the provinces, abounds unhappily in cases falling within the same general description. The tyranny, too, of the ruling party generally, cannot be represented with truth to have differed much in Edinburgh from what prevailed in provincial towns both of England and Ireland. Of some, as Liverpool and Manchester, we can speak with the most absolute confidence.

The state of the Scotch Bench gives rise to many of Lord Cockburn's most severe animadversions; and it is singular that he nowhere marks the real origin of all the great defects in the judicature;—the preposterous number of the judges—twenty-one in the Supreme Courts, beside the judge ordinary of each county—the sheriff—with large jurisdiction. To supply such a number of well-fitted persons, the Bar was plainly inadequate; but the evil was still greater in the facilities afforded to appoint men of inferior capacity, and who were either the personal friends or the party adherents of the minister. A man of Lord Melville's extreme good-nature and social disposition was sure to gratify his personal friends, as he was likely from ambitious motives to advance his political adherents. But before we join the cry of his adversaries on the appointment of one or two men allowed to be unfit for their high station, let it be remembered that some sorry nominations have at different times called down the censures of Westminster Hall. We have all heard of the alleged origin of the judges in one of our courts, when one was said to take his place by operation of law (he being an excellent lawyer), and another by prescription (he being brother of a court physician); nay, when at another time the same Court was described as composed of one who was a gentleman and no lawyer; another, a lawyer and no gentleman; a third, both; and a fourth, neither. The joke and the epigram no doubt entered for something in the composition of such pictures; but all lawyers knew that there was too much foundation in the likenesses. That the Prince of Wales interposed directly both to obtain for a personal friend, wholly unfit for the office, the *quasi* judicial place of Master in Chancery,

Mr. Twiss has fully shown in his *Life of Lord Eldon* ; but it is equally certain that he obtained by importunity the place of a Baron of the Exchequer for another ally many years before. Then as for political connection, what adherent of the Opposition ever ascended the English Bench during the times of which Lord Cockburn writes? Nay, was it not reckoned a great victory, long after, of Lord Ellenborough, that he could obtain the promotion of by far the greatest lawyer of the day, but one who had, though most quietly, and almost secretly, betrayed Whig propensities,—the late Mr. Justice Holroyd ; and this was marvelled at in Westminster Hall, though it happened long after the healing administration of Lord Sidmouth, and when all the heats engendered by the French Revolution had passed away ; nay, had almost been forgotten.

But, Lord Cockburn brings a much heavier charge against the members of the Scotch Bench, than the origin of their official promotion ;—that they showed partiality in political cases, and that they ill supported the dignity of their high places, is the burthen of his song ; and he illustrates the position by a great number of examples. Now we suspect that he will be found, in the first place, to err in confining one of these censures to the Scotch Bench ; and next, to have, from the two causes already suggested—party prejudice and love of recounting anecdotes—in no little degree coloured and exaggerated the facts.

That in seasons of great political excitement, such as those to which the atrocities of the French Revolution gave rise, the judges, like the rest of the community, betrayed feelings which it was impossible not to have, and often difficult to restrain within due bounds, is altogether undeniable ; that the English judges were wholly exempt from blame in this respect, cannot be pretended. Whoever has attended on the trial of *ex officio* informations for libel, must be aware of the scenes constantly exhibited, of contentions between the Bench and the Bar. But we need only ask, what kind of conduct must have been held by one judge, when so mild a nature as Erskine's, and so chivalrous in delicacy of speech, was betrayed into applying the word, "Scoundrel ; it's false, and you know

it;" or, upon the trial for high treason in 1794, what must have been the glaring partiality of the presiding judge, when that illustrious advocate, the most unassuming of men, but, above all, the most habitually careless of his precedence as an earl's son, could push the Chief Justice aside on walking out of Court to the dining-room, and walk before him? But the fact is undeniable, that one judge tried a *quo warranto* case respecting a borough of which he was part-owner, as regarded the returning of the members. Lord Thurlow had this in his eye, probably, when he said that he had long hesitated between the intemperance of Kenyon and the corruption of Buller, but had decided to make Kenyon Chief Justice; adding, "Not that there was not a——deal of corruption in Kenyon's intemperance." Now Lord Cockburn, a collector of anecdotes, and not unfrequently taking things seriously that were spoken in jest, would probably have set down Kenyon as corrupt, almost equally with Buller. That the judges in England may, for the most part, have shown their political feelings with more decorum than was always displayed in Scotland, is possible, although our courts were not without scenes of another description; but in those days it was a very common observation that you could generally tell beforehand how a point would be decided, on which turned some important prerogative of the Crown. The judges, it used to be said, can always grind a little law as it may be wanted for the occasion. Let it be remembered, that we are very far from vindicating the Scotch judges for the violence which they are said to have shown; but we deny that they were among judges the singular case, and that all the prejudices—the honest prejudices—to be, if not severely reprobated, certainly to be deeply lamented as often as they cross the judicial mind—were confined to the judges of Scotland.

Lord Cockburn dwells with much severity upon the conduct of the Scotch Court in the trials for sedition, 1798 and 1794. It no doubt strikes Englishmen, and even English lawyers, with astonishment, that men should have been sentenced to fourteen years' transportation for what in England is only punishable with fine and imprisonment; but there can be no question that the law of Scotland visited sedition with that heavy

penalty, until it was altered in the reign of George IV. But suppose the Crown had only prosecuted for sedition in 1794, instead of high treason, of which the defendants were with some difficulty acquitted, a conviction would have been easy, and a matter of course; nor can we doubt that sentences of fine and imprisonment would have been pronounced, not far short of transportation in severity. This we know, that long after the heats of party had subsided, with all alarms about revolution, two years' imprisonment was the lot of men who had written disrespectfully of the Prince Regent, and three years, somewhat later, for attending a seditious meeting. We will furthermore venture to ask, whether our English Courts, sitting under the alarms of 1793 and 1794, would have hesitated to send men convicted of sedition to exile in Australia, if it had happened that the law of England armed them with the power of inflicting this heavy punishment?

It may be well to recollect in what terms the administration of the English law by the juries and the judges of 1794 was spoken of by the more zealous friends of the Constitution, those most under the influence of the alarms spread abroad by the horrors enacted in France. Two years after the treason trials, and when time had been given for reconciling them to their disappointment in its result, we find them complaining of the course of justice having been obstructed,—nay, of those who had the office of administering it, siding with the enemies of the Constitution. Mr. Burke places this evil at the summit of all the greatest calamities that have befallen us, and the greatest dangers that beset us. “Great reverses of fortune there have been, and great embarrassments in council; a principled regicide enemy possessed of the most important part of Europe, and struggling for the rest; within ourselves, a total relaxation of all authority; whilst a cry is raised against it, as if it were the most ferocious of all despotisms. *A worse phenomenon,—our Government disowned by the most efficient member of its tribunals, ill-supported by any of their constituent parts; and the highest tribunal of all, deprived of all that dignity and all that efficiency which might enforce or regulate, or, if the case required it, might supply the want of every other court.*” (It is

probable that he here refers to the House of Lords having acquitted Mr. Hastings ; but also to its being unable to supply the defects of the ordinary tribunals, to which what follows plainly alludes.) "*Public prosecutions are become little better than schools for treason*, of no use but to improve the dexterity of criminals in the mystery of evasion, or to show with what complete impunity men may conspire against the commonwealth, with what safety assassins may attempt its lawful head."—(Regicide Peace, Works, viii. 94.) Such is Mr. Burke's deliberate opinion of the acquittal from a charge of high treason, which it took ten hours for the public prosecutor to explain before the Court and jury. We may be permitted to question the assertion of his son, in a letter to Sir Philip Francis, respecting the extravagances in his book on the French Revolution :—"I tell you his folly is wiser than the wisdom of the common herd of able men."—(Corresp. iii. 133.) But be this as it may, we conceive that we have shown sufficiently how strongly the feeling that guided the Scotch Courts prevailed among alarmists in those days ; and all were alarmists, even the handful of Whig partisans scattered thinly over the country. Thus, while under the influence of party feelings, Lord Cockburn denounces the Scotch judges and juries as having sacrificed their duty to their political feelings, in punishing too severely, Mr. Burke complains even more bitterly of the English Courts for suffering the same class of persons to escape ; and it may be observed that neither of these censors rests satisfied with denouncing mere errors of judgment ; both inveigh against the tribunals as guilty of injustice. If we wanted any further illustration of the effects of party bias on the judgments of men assuming to give historical statements, we might cite the manner in which such portions of contemporary events as we have been considering are dealt with in a work like the *Annual Register*. Compare the account of French affairs in that well-known work before it came into the hands of the Dissenters in 1793, and after that time. One instance may suffice. In 1795 the revolution of Thermidor is recounted, and the trials of those who were in consequence brought to justice. The most atrocious by very far of all the enormities which had been committed during the

reign of terror, were the horrid cruelties of Carrier, his wholesale massacres of all ages and both sexes, accompanied with every kind of hideous outrage, not only upon humanity, but upon public decency. Of this the only notice taken is, "that Carrier had taken a very active part against the rebels in that department; made an able and argumentative defence, but was condemned."—(*Ann. Reg.* 1795, p. 393.)¹ But no further illustration is wanted of the manner in which men's narratives are tinged by their party prejudices.

We have noted another cause of error combined with these prejudices in misleading Lord Cockburn,—the love of collecting anecdotes, and of retailing them. The work before us really owes its existence to this propensity; and there can be no doubt that, like most celebrated individuals, of whom Sir Walter Scott must be counted one, he entertained society with these narratives. Such writers almost unavoidably fall into the bad taste of adorning their subject with some traits from fancy rather than memory, and the merriment of listeners, much more than their applause, encourages a good-natured person to be little sparing of the ornaments which give pleasure. Repeated narration soon makes the historian really believe all the added particulars to be only representation of the fact. We are now speaking, no doubt, hypothetically, and without the least knowledge of the party, excepting what the book affords. But there is a constant recurrence of passages which manifestly owe their interest to colouring and exaggeration. We may possibly give a few instances before we close these remarks; but we now hasten to set right his lordship's statements respecting some of the judges, when he speaks personally, with unjustifiable severity, or with misplaced levity.

Among these he singles out as the chief object of his vituperation Lord Braxfield, for many years at the head of the Criminal Court,—a man certainly of the greatest eminence among the first lawyers of his day, as certainly a man of coarse manners, and of considerable violence in his opinions,

¹ The only trace we find of right feeling in the different parts of this work is an expression of some religious feelings upon the outrages of the atheistical fanatics.

and in the language in which he gave them expression. But Lord Cockburn charges him with "the indelible iniquity of the political trials of 1793 and 1794," and at once says, in so many words, that "he was the Jeffries of Scotland" (p. 116). He adds that he was the "only very powerful man the Court contained, and the real director of its proceedings; that the Reports make his abuse of the judgment-seat bad enough, but that "his misconduct still more transpired in casual remarks," of which he professes to give some. We have examined the Reports, which are all to be found in vol. xxiii. of the State Trials, so ably and carefully edited by Mr. Howell, and we find nothing whatever to maintain the charge against Lord Braxfield. He concurs in the sentences moved and supported by his five brethren; and it must be observed of those sentences, that excepting in the cases of Muir and Gerrald, perhaps also of Margaret, the sentences about the same time pronounced in England were more severe, and even long afterwards, for the same offences. Thus one of the Scotch prosecutions was for seditious and inflammatory language addressed to soldiers of the garrison, and the punishment was nine months' imprisonment; whereas we have seen a heavier punishment, many years after the heats of the times had passed away, inflicted for one part only of the same expressions (cursing the King), and without the great aggravation of the military audience. Another case was for a most virulent libel upon the Constitution and the Sovereign; the punishment was six months' imprisonment to the author, and three to the printer. Frost, in England, was imprisoned six months, and stood in the pillory, beside being struck off the roll of attorneys, for saying he was for equality and against having kings. Gilbert Wakefield was imprisoned two years for a general approval of the French Revolution, and saying what the Court deemed to be things that had a tendency to relax the zeal of the people in resisting the French, whom the judge, in passing sentence, described as "those monsters of iniquity who in ten years had been Catholics, Deists, Atheists, and Mussulmen." Kyd Wake, for shouting and hissing on the King's passing to Parliament, and using insulting expressions; as, "No George!" "No war!" was sentenced to five years' im-

prisonment and the pillory. Wm. Winterbotham, a dissenting clergyman, for preaching two sermons, in which he praised the French Revolution, and said it had opened the eyes of Englishmen, who would no longer bear to be misgoverned, was sentenced to four years' imprisonment on two prosecutions tried before the same judge at the same assizes, and sentenced by the Court of King's Bench, although that judge had strongly summed up for an acquittal in one of the cases; but Baron Perryn laboured under the suspicion of holding liberal opinions, in which Lord Kenyon certainly did not share. Had the same discrepancy been shown in Scotland, the Justice Clerk would no doubt have been most severely reprov'd by his political adversaries; but no one in England ever dreamt of comparing Lord Kenyon to Jeffries. The sentences on the men of superior talents and station were, no doubt, much to be lamented, and to be disapproved; but that the extreme punishment which they awarded was according to the law of Scotland is undeniable; and we conceive that the contrast which those sentences present to the milder ones upon inferior persons was in a great degree owing to the Court believing they had now before them the leaders of the evil-disposed, and being determined to deal with them more severely than they had done with men in an humbler condition.

That Lord Braxfield had any more prominent share in those sentences than his brethren, does in no manner of way appear; and in the trial of the cases nothing whatever occurred to call for an observation. It is true that Margaret and Gerrald took an objection to his sitting, upon the ground of some hasty expression alleged to have been used by him, in a private company, respecting the body called the British Convention. The other judges, to whom this point was referred, would not suffer it to be gone into, holding that it afforded no ground of declining the Justice Clerk's jurisdiction, even if the words were proved to have been spoken; and undoubtedly nothing was alleged that amounted to any prejudication of the accused parties, how indecorous soever such strong language might be, if used by a judge, even in private society. There was indeed, in Gerrald's case, one interruption of the eloquent speech of the

prisoner; an interruption showing sensitiveness, without much accuracy, on the subject of Christianity. Gerrald had said that all great reforms were innovations;—the Revolution, the Reformation, and Christianity itself; on which Lord Braxfield said, "He has been attacking the Constitution, and now he is attacking Christianity itself." There was here a confusion of ideas unaccountable in so very acute a person; because the whole force of the argument consisted not in attacking religion, but in holding it entitled to the utmost veneration. But the horror of innovation plainly misled the judge; he was beguiled, as possibly Burke himself might have been, by that horror, into the notion that to charge anything as an innovation was to condemn it. Indeed, one of the other judges seems to have felt somewhat of the same horror; for he describes the comparison of the Revolution of 1688 as constituting "a most indecent defence, and which no one but a stranger would have been allowed to offer upon his trial." But Lord Cockburn is not satisfied with this charge against Lord Braxfield. He says that the "reporter could not venture to make the prisoner say more than that Christianity was an innovation; but the full truth is, that he added that all great men had been reformers, even our Saviour himself." The report of the trial in Mr. Howell's collection, to which Lord Cockburn's reference is made, bears plain internal evidence of having been revised and corrected by Gerrald himself. There is therefore no ground whatever for alleging that anything is suppressed. But Lord Cockburn proceeds to supply what he considers wanting, and he adds, that upon Gerrald naming our Saviour himself as an innovator, Lord Braxfield "chuckled, in an under-voice, 'Muckle [much] he made o' that; he was hanged.'" Now we have made full inquiry into this most extraordinary assertion, and we find that the words put into the judge's mouth were known in Edinburgh to be a mere invention, a jest that passed current at the time, and was, by all who heard it, known to have—most men said—no foundation at all, while some few believed, or affected to believe, one part of the *dictum*, saying that Lord Braxfield might have muttered "Muckle he made o' that;" but all, without exception, utterly denied the grossly indecent addition.

The improbability, indeed, of the story is manifest, but most especially is it evident that if the words had been used, they could only have been heard by the two judges sitting close by the chief. This we are informed must have been the case, from the position of the judges and the construction of the court. Then no one can suppose it possible that these only listeners should have repeated the thing. But for our peremptory contradiction of the story we refer rather to what is well known to all who lived at the time, that the speech was universally treated as a mere jocular invention, by way of very gross caricature of the chief.

The holding up Lord Braxfield as the Jeffries of Scotland is if possible more intolerable. None, even of that most able and learned, though coarse and even violent judge's enemies, ever presumed to insinuate the least suspicion of corruption against him. Nay, all who were acquainted with him have borne testimony to his amiable and kindly disposition. He is described by the late venerable Lord President Hope, in a letter which appeared in the first number of the *Law Review*, vindicating him from another calumny circulated on Sir Walter Scott's authority, as a person of a kindly nature, and a warm and steady friend. He is well known to have had an extreme abhorrence of anything mean and base, and his feelings were more warm than even his temper was hasty. That he was of the most scrupulous integrity, of the highest sense of honour in all respects, both public and private, none have ever doubted; and this is the person whom Lord Cockburn, inspired with the bitter feelings of party, thinks it fit to compare with the worst man, the most profligate and corrupt judge, that ever polluted the Bench, a person whose cruelty was exceeded by his scandalous and his even ostentatious dishonesty, and who has left to all ages a name that cannot be pronounced without a shudder, as designating one who was, for every vile and bad passion, a disgrace to human nature.

There are manifest indications of caricature in many parts of the book. The accounts of several of the judges, as regards their personal peculiarities, seem plainly of this description; but, generally speaking, they do not redound to the discredit of the

individuals. It is a great exaggeration, no doubt, to affirm (p. 146), that with two exceptions among the judges, of persons who, "by some accident, did not directly owe their appointments to Lord Melville, there were not fifteen other men in the island to whom political independence was more offensive than to the fifteen judges." The story is evidently coloured, if not altogether fanciful, of their old habit being to have wine as well as cakes on the bench before them, and that those who remained after Lord Cockburn came to the Bar, continued the practice of drinking pretty heartily while business went on; so that "though the strong-headed stood it tolerably well, yet it told plainly enough upon the feeble; not that the ermine was absolutely intoxicated, but it was certainly sometimes affected." Indeed, the whole of p. 345 has a fancy dress. The picture of his near connection Lord Hermand belongs to this class of caricature, to all appearance making him, though an amiable man, of some ability, and of perfect integrity, yet exceedingly ridiculous, and from his unimportance in all respects, not perhaps worth describing at all, certainly not worth describing in such minute detail. It may be noted that Lord Cockburn is very far indeed from sparing himself: his account is throughout more than modest of his own pretensions. But a tone of exaggeration is here perceivable. Thus, as regards his earliest days, and his master, whom he represents as beyond conception unqualified to teach, he records himself as flogged once in ten days during four years, as never getting a single prize, and as an habitual dunce; and he afterwards says, that of all the speakers at the Speculative Society (76), "he was decidedly the worst, and the most unpromising;" which statement may be supposed an exaggeration, from the company it is found in; for he adds, "worse, perhaps, than even Charles and Robert Grant, both of whom have since risen to high stations in private and in public life." It was, we believe, never denied that these two eminent individuals, Lord Glenelg and his truly-esteemed and lamented brother, had begun to distinguish themselves at that early period by their eloquence. He describes himself as having been very uneasy at the position in which he was placed of presiding at a great dinner given to Mr. Brougham, in 1825, and tells a

story, which clearly, and on the face of it, is fancy, of that gentleman expressing his extreme alarm at having to address so much larger a meeting than he had ever before seen (above 800) under one roof (p. 426). To try how far the accuracy of this statement was possible, we looked to the only two volumes of Hansard within reach, and found that a few days after the dinner, Mr. Brougham had addressed, gallery included, above 700, a few weeks before, above 600,—the occasion on which Mr. Canning, anticipating his speech, made the quotation—

“Experto credite quantus
In clypeum adsurgat, quo turbine torqueat hastam ;”

and, 22 June, 1820, above 700. Now to suppose that the difference of 100 or 150 could make the Edinburgh audience so much more formidable, is ridiculous ; and Lord Cockburn manifestly confounded two perfectly different things. Mr. Brougham must have expressed the horror he felt, like all practical speakers, at speaking about nothing,—speaking for mere speaking’s sake ; a horror of the *epideictic* oratory which made Mr. Fox all his life incapable of uttering three sentences at an after-dinner discussion.

A remarkable incident was connected with Lord President Blair’s funeral. Lord Melville died suddenly the night before ; having, before he retired to bed, written a letter to Mr. Perceval on behalf of his oldest friend’s family, which he intended to put in the post-office after the funeral ; speaking *nunc pro tunc*, he said he had just returned from attending on that occasion. This accident prevented the letter from being used ; but Lord Cockburn adds a colouring to the simple fact. He says that this letter “gave a feeling account of his emotions at the president’s funeral ; it was a fancy piece” (p. 258). From all we know of the matter, the “fancy piece” is Lord Cockburn’s, not Lord Melville’s, who was the last man in the world to give “a feeling account of his emotions,” and only said that he had returned from attending the funeral of his oldest friend.

It may not be worth while to note minor inaccuracies in this book, though these are calculated to impair the reader’s confidence. Thus Dr. Adam, highly and most justly praised, is represented as wholly unacquainted with the political events of

the day, so "that it may be doubted if he ever knew one public measure or man from another" (p. 6); but spoke of liberty from his classical recollections. They who remember that excellent, useful man, give a very different account of his familiarity with the topics of the day. Then Henry Erskine's presiding at a public meeting against the war, is given as the ground of the Faculty of Advocates removing him from the deanship: it was, we are pretty confident, a meeting against what were called the "Gagging Bills" of Mr. Pitt and Lord Grenville. The hopes of the Tories on Mr. Canning's death—portending a return of their power—are said to have continued for some weeks, but to have been dashed to the ground by "Lord Lansdowne's becoming Home Secretary, with Abercromby and Kennedy as his chief Scotch advisers" (p. 148). Now this is, both in conception and execution, a pure "*fancy piece*," to use the author's language on another occasion, because every one knows that Lord Lansdowne was Home Secretary some time before Mr. Canning's death, and the only change which then took place was Lord Goderich leaving the Colonies for the Treasury. Other inaccuracies might easily be pointed out. We are told that the account of Professor Ferguson's temper (p. 50) is not correct; that of Professor Robison's ailment is certainly inaccurate (p. 56). The description of Dr. Macknight (erroneously called Thomas, his name being James) is said to be much caricatured; and that Principal Robertson's "language was good, honest, national Scotch" (p. 55), is contrary to all the accounts which remain of him, he being, except in the pronunciation, a scrupulous adherent to the English vocabulary, as Mr. Hill Burton has related also of Mr. Hume, though he, like his brother historian, never laid aside the Doric tones.

It is impossible to question the excellent qualities of Lord Cockburn, or to doubt his talents and information; least of all can any one deny his strict integrity. When we have called in question his severe judgments on some persons, and his statements of facts on many subjects, we have expressed our dissent from the one, and our disbelief of the other, on account of the strong party bias under which he manifestly laboured, and the love of collecting and retailing anecdotes by which he

was actuated. That with all the deductions which can be made from the authority of his book, it will still have many readers, and deserve to have them, we are quite ready to admit ; but it was necessary, out of regard to the correctness and purity of legal history, as well as from a sense of justice towards parties no longer alive to defend themselves, and who have left no representatives to undertake their vindication, that we should examine the work narrowly, and prevent the currency of that which, how innocent soever in its origin, nay, however well meant as regarded the design, was nevertheless mingled with, and sometimes entirely founded upon, error.

It has of late years been a prevailing practice to publish, soon after a person's decease, his correspondence, his diaries, or other notes which he may have left as to occurrences in which he bore a part, or of which he was a near observer. That much has been made public which ought never to have seen the light, is unquestionable, and that the memory of the departed authors has been often more injured than the credit of those respecting whom they wrote, cannot be denied ; yet as regards both the truth of history and the character of individuals, it may be well suggested that this hasty publication has important advantages. Doubtless it might be far better that all men's statements, whether of fact or of opinion, should be publicly made by themselves, under the checks and safeguards of their personal responsibility ; nor can anything be conceived more reprehensible than for men to pursue the course which in some has been so justly reprobated, collecting gossip, mixed with much slander, to be printed after their death, as in Mr. T. Moore's case, for the benefit of their family ; or as in M. Châteaubriand's, for his own anticipated profit. But if such things must see the light, and only after their author's decease, it is better that publicity should be given early than at a remote period, when there can exist little chance of the truth being brought out, from the want of contemporary witnesses, or the loss of other contradictory or explanatory evidence. The early publication of Lord Cockburn's Remains falls within the scope of this observation ; and has given the means of offering a correction to errors which might otherwise have both been

detrimental to historical truth, and worked injustice to individuals. We have repeatedly had occasion to undertake the defence of those who, like Lord Eldon, had left no relatives who could protect his memory; or like Lord Erskine,¹ had left relatives who did not think fit to come forward in his vindication. The entire opposition of our sentiments upon almost all subjects in the former instance, far from making this duty less incumbent, only seemed to call the more for a strict performance of an act of justice. Of those, chiefly assailed by the work before us, we have to the full as great a disapprobation in respect to opinions and errors,—in many particulars in respect to conduct. But we have felt, that seeing error corrected, and therefore justice done, was the more imperative duty; and let it be added, in all sincerity, we have felt the most pure satisfaction in the discharge of it.

ART. II.—ON PROBATE OF WILLS.

THE historical method, though understood before the age even of Mr. Justice Blackstone, has, in legal matters, been applied in England with but small research and very little accuracy. The *tentamina* in this direction of that learned judge, with the exception of those which relate to constitutional matters, are such as to excite regret only for so distinguished a name in the minds of the present generation.

But these failures have nothing to do with the merits of the system, which have been proved, and are indisputable. In

¹ It became necessary to state the fact as regarded Lord Erskine, when the absurd stories were published by party organs of causes left undecided, but also when Lord Stanhope thought proper, in his *History of the Times*, to pronounce an opinion, as confident as it was groundless, and to those even moderately acquainted with the subject, ridiculous, on that great man's literary merits. We perceive a singularly ill-informed critic, in the *Edinburgh Review*, has lately held up to admiration Lord Stanhope's account of individuals, in his classing Lord Althorpe with the *fainéant* leaders of party. The same writer represents Mr. Fox as never attending Parliament from 1792 to 1804! Such things are incredible.

showing the origin of a legal institute, this method leads us also to its primitive *rationale*, and supplies us with a test for appreciating any new *projet* which modern fertility may produce. A consideration of the reasons which have given vitality to the old custom, may show how a sufficient reform may be conceived and effected without disturbing the former social securities. For if the analysis demonstrate the original grounds to be partially unsuitable, or wholly inapplicable, to the present circumstances of society, a new principle may then, without hesitation, be introduced, either to take its place by the side, or to supersede the old one altogether. By applying such a method as this, we are enabled to go our way over difficult ground, without taking any of those blind jumps into a tentative futurity to which mere innovation would otherwise impel us. By this method, and this alone, we can leisurely compare the modern with the ancient idea, before we proceed with the work of alteration and destruction; and as we may in some cases innovate for the better by progressive movement, so in other cases we may benefit society in an equal or a greater degree, either by pulling up when we find, on examination, that we may safely stand by an old usage whose principles we have learned to comprehend, or by retracing, in a spirit of conservative retrogression, more distinctly and truly its original idea and object. This method we now propose to apply to the subject of Probate of Wills.

In the first place, we will ask what is a probate? This question, simple, and of every day, as it seems, has more difficulty in finding an accurate solution than the reader might at first imagine. Many persons (and those not of the smallest pretensions) will answer that it is a legal copy of a registered will, and there they will stop; and so far the answer is a true one; but a probate is also something more, and so in fact it proclaims itself, in its old traditional and long-descended language. For every probate declares that a will has been *proved, approved, and registered*; and also purports to grant to the executor *administration* of all the testator's personal estate. It therefore combines a certificate that the will has been duly insinuated, with an express authorization to the executor to exercise the functions of an administrator under it.

For a will does not confer, either *per se* or through its authentication, any power upon the executor, or upon any one else named in it, to administer a testator's chattels. Thus the authentication of the will is insufficient without the delegation of the administrative function; and neither implies the other. But though they are two distinct operations of law, they are nevertheless always accumulated by the same legal authority upon one individual, who, therefore, if he proves a will, must at the same time be prepared to ask for administration also.

In fact, an executor and a next of kin stand in precisely the same relation to the Court of Probate, the one as the other. Each is unable legally to act without or before administration granted; but the Court is bound by law to grant such administration to each, if he requires it; to the former in obedience to the decisions of the common-law judges, overruling the discretion which the Canon Law once allowed; and to the other in obedience to the statute of Henry VIII.

In history both these operations of law (which form what the Master of the Rolls, in *Watson v. Swift*, called "the twofold office of probate")¹ have had separate origins, though they now meet on common ground. The one shadows forth the *insinuatio testamenti* of the Roman Law, while the other is a development of a peculiar principle first evoked under Christian influences, and afterwards recognized and confirmed by the emperors, but which has completely managed to escape the searching gaze of English juridical eyes. To the Roman insinuation, united with this last-mentioned principle, which was in its first stage denominated *tuitio testamentorum*, we owe the modern probate.

This *tuitio* was purely Christian in its object as in its origin: the support of the poor, the relief of widows and orphans, the redemption of captives, and the alleviation of misery in every shape amongst the faithful, was the native office of the Church. To fulfil and effectuate this aim, large funds were necessary. These were supplied by the voluntary contributions of the Christian congregations at the offertory during their lives, and by their testamentary donations on their death. As a logical

¹ 14 L. J. Rep. (N.S.) Chanc. 354; 8 Beav. 368.

consequence of the care of the poor and the miserable, which the Church had undertaken, it became a self-imposed but necessary function for her to see that those funds, whether a legacy or an inheritance, were not diverted by greedy heirs and relatives from the purposes of testators. The means of effecting this object were those only which the Church by her constitution possessed, and they were simply episcopal remonstrance or monition, followed by excommunication or suspension *ab ingressu ecclesie*, in the event of contumacy. And for these reasons the institute under consideration assumed only the modest name of *tuition*. But as such it was a power and an influence, long before it was a law.

Its existence in the West is distinctly referred to the year 398.¹ In that year, at the fourth council of Carthage, the African bishops, whose ascetism was notable, forbade their brethren to exercise this tuition, by enacting "*ut episcopus tuitionem testamentorum non suscipiat.*" This shows that the tuition was a regular business at that time, because, if it had not been so, and had been merely a theory of natural or religious equity, it would have been purely a matter to be preached from the pulpit and urged in the confessional, and would never have interfered with the episcopal functions, nor consequently have attracted the reprobation of the Council.

We can find no recognition of this practice and system in the legislation of the emperors until much later, and then it is in the East. This, however, is not surprising; for the ideas of the Church have in other matters also preceded law. The application or invention of trust uses in England is a noticeable example of this.

While the zeal of the emperors favoured the endowment and foundation of churches, it was their policy to promote and even to facilitate charitable bequests and gifts to the poor. It obviously tended to allay the discontents of the starving *coloni*, rigidly kept within the bounds of their native districts, and denied free egress and circulation. Thus entire inheritances given to the poor were, in the East, relieved from the burthen of the *Falcidia*,

¹ Caranza's Councils, and Edwards's Ecclesiastical Jurisdiction, p. 42. It is recited by Gratian de Secular. Negot. c. 5, pars 1, distinctio 38.

and specific gifts for pious causes were rendered operative in all cases.¹

Under these circumstances, the *tuitio* must at an early period have been allowed and perhaps encouraged by all the Christian emperors in the West as in the East. In the latter empire, Justinian has some most explicit regulations upon this subject. In the first book of the Code (tit. 8, p. 49) he enacts that if any person, with a view of evading the Falcidian portion (*ad declinandam legem Falcidiam*), has named captives or *pauperes* as his heirs, the bishop of his city, and the *æconomus* of the latter, "*hereditatem suscipiant*:" and they shall be heirs without the Falcidian (*sine Falcidiæ legis emolumento*); i.e., in other words, they shall be the nude executors of such a will. And that such is strictly and precisely their office, he further demonstrates by declaring that they shall be empowered (*licentia danda*) to bring actions, to sue for and call in debts, and also to answer to creditors; and finally, he denominates them *administratores*. And in the Novels he enacts that, in the case of single legacies for the redemption of captives, the support of the poor, or other religious purposes, the Bishop, whether named or not as the *minister* for that purpose, or even if expressly prohibited by the testator, shall receive and apply the property so bequeathed.—(Nov. 131, tit. 11.) In the same Novels he also enacts that all legacies left by testators *ad pias causas*, be carried out by the provision (*provisione*) of the bishops. In the Code (lib. i. tit. 3, p. 46) he directs, if a testator has made a pious disposition of the whole or a part of his property, and the heirs neglect to carry it out, "*confestim loci Deo amabiles episcopos curiosos*" esse circa hæc, et postulare ut illi omnia impleant secundum voluntatem defuncti." And this right of action against the heirs is in the same law given to the bishops, whether they be named or left unnamed by the testator, or even if he has prohibited their interference.

It was a great step towards the organization of charity, that a perpetual corporation, of the nature of the episcopacy, should

¹ See *Law Magazine*, vol. xxiii. (N.S.) p. 115.

² The reader is referred to the Codex Theodosianus for an illustration of the word '*curiosus*' (lib. vi. tit. 29). *Curagendarii sive curiosi* are expressive of inquisitorial agency.

be charged with the office of collecting and applying, or enforcing the application of charitable trusts; and it is impossible to over-estimate the good which the Church must have effected in the willing discharge of this obligation; for by the time of Constantine, almost all wills and codicils contained pious dispositions. As under the pagan emperors it had been the fashion for their co-religionists to leave them bequests, more or less extensive, so, under the empire of Christianity, the faithful considered it a duty, and made it a rule, to bequeath portions of their property to the Church,¹ as the best guardian of the poor and the struggling. But as it was a peculiarity of the Roman law, that all legacies depended for their validity upon the institution of a *heres*, many pious and charitable intentions must have fallen to the ground, as being contained in a will rendered informal by such a grave omission of the rigorism of the Civil Law, and yet those legacies would be in their own nature such as, under other circumstances, the Church would have become *tutrix* or guardian of, if there had not lacked an heir to wring them from.

The Church must have deplored these consequences, as she had regretted her losses under the analogous circumstances of religious and charitable *ministeria*, rendered inoperative through the want of a *persona designata*.²

There was, therefore, a necessity that more equity should be infused into the law regarding these subjects, by modifying the great Roman principle of the institution of a *heres*. So the Church thought; and action seems to have followed upon thought with rapid strides, in the old and energetic days of the Church. To see a secular injustice was to resist, to neutralize, and destroy it. But the Church was no mere agitator for a repeal of obnoxious forms which pertained to the secular system, or of iniquitous practices which had grown up into it. She was more; and though she could not repeal an unjust law, she had an admitted authority to punish all men who did unjust acts themselves, or upheld others in doing them, founding her judgments upon her own, and not the secular code. On this subject

¹ Troplong's *De l'Influence du Christianisme sur le Droit Civil des Romains*, p. 122.

² Vol. xxiii. (N.S.) p. 113.

her censures were as authoritative as the laws of the world. She could suspend or excommunicate all who offended against the immutable principles of justice, which she understood and interpreted on the broad basis of a common morality: and at such a tribunal the conventional legality of an act could not be pleaded and accepted as a legitimate defence. Accordingly, we find the Church in Council resorting to excommunication against such next of kin of bishops, priests, and clerks as availed themselves of an informality in law to escape from the execution of legacies for pious or other purposes. We find a record of such a proceeding at the second Council of Lyons, A. D. 567, and the fifth Council of Paris, A. D. 614:¹—

“Quia multæ tergiversationes infidelium Ecclesiam Dei quærunť collatis privare denariis, secundum constitutionem præcedentium Pontificum, id convenit inviolabiliter observari, ut testamenta quæ episcopi, presbyteri, seu inferioris ordinis clerici, vel donationes aut quæcunque instrumenta propriâ voluntate confecerint, quibus aliquid Ecclesiæ aut quibuscumque personis conferre videantur, omni stabilitate subsistant. Specialiter statuentes, ut etiam si quorumcunque religiosorum voluntas, aut necessitate aut simplicitate faciente, aliquid a legum sæcularium ordine visa fuerit discrepare, voluntas tamen defunctorum debeat inconvulsa manere, et in omnibus Deo auspice custodiri. De quibus rebus, si quis animæ suæ contemptor aliquid alienare præsumpserit, usque ad emendationis suæ vel restitutionis rei ablatæ tempus, a consortio ecclesiastico, vel a Christianorum convivio, habeatur alienus.”

The defect pointed out by this canon must have been a latent one. It could, therefore, only have been the omission of naming an heir: a deficiency of witnesses would have been obvious, and the question would have been raised during the lifetime of the testator by the authority to which the custody of the wills of living persons was ascribed—the same to which the *reservatio* and *insinuatio* also belonged. This purely ecclesiastical measure must have had the same indirect compulsion towards bringing about an amended state of things, as the secular

¹ André's *Droit Canon*. vol. v. p. 233, quoting Labbe's *Sacrosancta Concilia*, tom. v. p. 848.

punishments of the rack or the prison-house. Though we thus find the Church taking the step which we have mentioned in the case of wills of her own members, she does so for the benefit of all persons. Her habitual wisdom told her that the beginning should be made within her own limited pale; for the separation of the clerk would justify a distinction in the secular laws which affected him. But the distinction was only demanded by her for the purposes of general justice. And in that lies the secret of the enormous growth of the wonderful Church of the first twelve centuries.

By these means the Church eventually wrung from the Law that a will should be operative for the legacies given by it, notwithstanding this specific defect of legal solemnity. But in order that such a will should be executed *pro tanto*, the Bishop stepped in as *tutor testamenti*, and executed it in that character, for there was no instituted heir whom he could compel to do so; and if he did not act himself, the existing law must have taken its course. Further, if he intermeddled *hoc intuitu*, he must do more,—he must administer the whole estate, in order to be assured that there were assets sufficient for the legacies which it was his aim to fulfil. Under these conditions, the *tuitio testamenti* became *executio testamenti*.

He was thus *executor testamenti* when the will was informal, as he had before been *tutor testamenti* when the will was solemnly made. The distinction between these offices was, that the former he executed himself, while in the other he was the *curiosus*, who compelled the heir to do it, and supervised him at the same time. But the two functions must inevitably have soon been confounded, and the tutor become executor, though the first name long after lingered in the East.¹

The Bishop, therefore, was the first *executor testamenti* known to the law; and so the canons of the Western Church have always designated him. The Bishop took with him his new function into his own court—the *Audientia*, for he could not be convened before the municipal *Curia*, of which he was head and superior, as we shall have occasion hereafter to observe.

But can we believe that the Bishop always acted personally as

¹ In Leo's Basilics (A.D. 905 to 911) he is still called *tutor*.

executor legitimus? In the early days he may have done so occasionally; but it is equally certain that he would more often nominate a trustworthy person to whom he delegated the administration. This deputy executor was of course amenable to the Bishop in his *Audientia*. He accounted to the latter, as he still does; he received from him the wages of his office and agency; and such he continued to receive until the Court of Chancery made him one of her trustees.¹

The public, who had thus been relieved from the yoke of Roman rigorism, speedily imitated the new practice, and aspired to appoint their own executors. But at the same time they could do no more than the law allowed them; they could only appoint an executor, subject to the executor already existing by law—the Ordinary.

“Rien n'empêche (says the Abbé André) au surplus, que le testateur ne nomme d'autres exécuteurs des volontés que l'évêque; mais il ne saurait par aucune défense l'exclure entièrement, ni même décharger les exécuteurs qu'il lui plaît de choisir, de la reddition de compte, pour raison de ces legs pieux.”²

But it may be easily conceived that the Ordinary would respect the wish and the recommendation of a testator. He would legalize and hallmark the appointee of the latter, by delegating to him the powers which in law belonged to himself, in the same manner and in the same degree as he would grant them to his own appointee under other circumstances. He would burthen him with the moral obligation of an oath of administration, sometimes requiring security from him for the performance of his trust with honour and fidelity.

Sometimes the Ordinary would reject him altogether, appointing another in his stead; for the indefeasibility of the executor's title, and his independence of the Bishop, is merely an invention of the English Common Law. He would allow him to be cited before his *Audientia* at the instance of creditors and legatees; and he would also protect and assist the executor by the exercise of the same authority against the debtors of the testator.

The executor is in other respects redolent of his ecclesiastical

¹ Edwards, p. 109, art. vii., in the Constitutions of Archbishop Stratford.

² Vol. iii. p. 491.

origin. In old English wills, before the Reformation, he is usually appointed "for the soul's health" of the testator; and in earlier days the traces are still more distinct. In a will (A.D. 819) of two monks of Tours, reference is made to the abbot, "in hujus *tuitione* nostra devotio defensata maneat inviolata." The will of the Viscount Matfredus and his wife (A.D. 966) appoints "eleemosynarios, ut omnia adimplerent." By the will of Adelais, Viscountess of Narbonne (A.D. 989), it is directed that the "eleemosynarii, sicut a me ordinatum viderint per hoc fidei-commissum, ita disponant omnibus rebus meis."¹

But this name eventually yielded the *pas* to the appellation *EXECUTOR*, and the later wills in Martene's collection, from which these extracts are taken, show it.

But it must be remarked that there was a part of France which never adopted the testator's executor. This was the *pays du droit écrit*.² It was adopted in the North of France, and was thence imported into England, after the Conquest, amongst the *leges episcopales* of the Norman hierarchy. But here it underwent a most important modification.

By the French law (re-enacted in the incomparable modern Code) the testamentary executor endured in office a year and a day only, after which the heir succeeded to the estate; for the one was meant only to protect creditors and legatees against the other. In England we can never find the executor in any such state of limitation. This year and a day of the French Law is a derivation from the *annus deliberationis* of the Roman Law, and must have been adopted by the Bishop, in order to make his executor answer the purpose also of the *curator bonorum*, whom the Prætor had occasionally appointed to protect and save an *hereditas jacens*, or unadministered estate.

The benefits of the *executio testamentorum* did not rest even with themselves. They were the precedent upon which the episcopacy relied when they exerted themselves to wrest the estates of intestates from the clutches of feudality. The Ordinary, after the fiduciary succession in intestacies had been accorded to him, called himself *executor legitimus* in respect of this privilege

¹ Martene's Collectio, vol. i.

² Merlin's Répertoire de la Jurisprudence, *sub voce* 'Exécuteur.'

also as well as of the other. The deputy in this trust was also called *executor*—i.e. *executor dativus*.

We will now turn to the other part of our subject—the probative registration of wills,—and in this also we shall find the remote historical element as prominent as in the other.

The Roman Law required all wills to be registered in the public offices of certain judges, to whose voluntary jurisdiction this insinuation appertained, and without it they were wholly inoperative and void, as not having upon them the seal of public authority. And as registration in all cases logically involves legal approbation, the Roman Law, with its customary caution, required proof of the due execution of a will to precede the insinuation. Accordingly, the attesting witnesses, whose names and seals were superfixed upon the will, were summoned before the *defensor civitatis*, to whom this jurisdiction belonged (in the provinces at least); and all, or the greater part of them, acknowledged their signatures and seals, both upon the envelope of the will and the will itself. This ceremony was called the *reseratio* or *apertura* of the will; and after this proof by the witnesses, the will was insinuated in the public register. The original was retained, and a probate copy of it, so proved and approved, was delivered to the *hæres*; and if that should afterwards be lost by him, he could obtain a duplicate.

The words of the classic Paulus upon this subject are sufficiently interesting to deserve a recital. He says (de Vicesima, lib. 4, tit. 6, s. 81):—"Tabulæ testamenti aperiuntur hoc modo, ut testes, vel maxima pars eorum, adhibeantur qui signaverint testamentum; ita ut agnitis signis, rupto lino, aperiatur et recitetur, atque ita describendi exempli fiat potestas, ac deinde, signo publico obsignatum, in archium redigatur; ut siquando exemplum ejus intercideret, sit unde peti possit."

Savigny (vol. ii. p. 191) quotes from Marini part of a Roman *Probate Act*, containing the affidavits of the attesting witnesses:—"Constantius, v. d. d. [vir devotus¹ dixit]:—In hoc testamento et me certum est interfuisse, in quo agnosco annuli mei signa-

¹ This word is used in the sense probably of what we call "respectable." It frequently occurs in the Codex Theodosianus: *devotus possessor*; *devotissimi milites*.

culum, superscriptionem meam et infra subscripsi. Pompulius Severus v. d. d. cum suprascriptis viris in hoc testamento pariter interfui, in quo agnosco anuli mei signaculum, sed et intrinsecus subscripsi," &c.

The voluntary jurisdiction in respect of wills was rigidly kept on the secular side of law, so long as there remained an empire of the West, and with some degree of jealousy, if we may so conclude from the fact that the Bishop really had a voluntary jurisdiction concurrent with the *defensor civitatis* on other civil matters of some importance.¹

But immediately on the fall of the empire in the West in the fifth century, a great revolution passed over the municipal *régime* of Gaul.² The internal administration, the voluntary jurisdiction, and the correctional police, had been in all cases left to the *Curia* or municipal *corps* of each city, while the contentious and criminal jurisdiction had been reserved to the imperial officer; but on the dissolution of the Empire, the municipal magistrates saw themselves suddenly invested, in addition to their former attributes, with an authority which they had never possessed before—an authority left vacant by the retirement of the imperial officers. Grave changes were then made in the *personnel* of the urban magistrature. All the notable or leading citizens, including the clergy, entered the *Curia*, the hereditary and aristocratic character of which was transformed into an elective government. The Bishop then intervened directly in the rule and administration of the city. He became president of the *Curia*, the first magistrate as well as bishop. And a hagiograph of the seventh century, quoted by A. Thierry, shows that he was elected by the people to each office,—to the secular as to the sacred. During the Merovingian period, the *Curia*, under its new presidency, continued to exercise the same voluntary jurisdiction over wills as before; but the *defensor civitatis* ere long disappeared entirely.

This state of circumstances does not, however, carry us much

¹ De Fresquet, vol. ii. p. 512.

² A. Thierry's *Monographie de la Constitution communale d'Amiens*, in his *Tableau de l'ancienne France municipale*; and the same author's *Essai sur l'Histoire de la Formation et Progrès du Tiers Etat*.

further ; for though the Bishop now decrees the *apertura* of wills, and afterwards approves and registers them, in all this he acts as the judge of a civil court, and his own *Audientia* has received no amplification of jurisdiction.

This form, however, of municipal administration was subverted on the maturity of the feudal system in the tenth and eleventh centuries. The *échevins* who had succeeded the *decuriones* in the Carolingian period, were replaced by the vassals of the Count, and the *Curia* became merely a *cour seigneuriale*, in which the Bishop lost his civil pre-eminence. Taking these circumstances in review, we cannot doubt that the voluntary jurisdiction over wills must have been transferred from the *Curia* to the Bishop's own Court before the feudal period. It could never have taken place within that period, for the profits of such a judicial speculation would have insured the Count's tenacity, and the Bishop had enough to do to hold his own, without encroaching upon the ground of others. The only period in which the transfer could have been made would seem to have been the Carolingian, for the popularity of the episcopal order with kings and people continued far into that age ; and as late as A.D. 575 we have recorded instances of wills proved before the *Curia*.¹

The object for which we can suppose that the Bishop advocated the transfer of the insinuation of wills to his own court and his own agents, must have been the facilitation of the execution of wills under the tutory power which he possessed. The way to such an event had been long previously prepared ; for even before the time of Constantine public opinion had of its own accord, as we have seen, placed testaments under the protection of the ecclesiastics,² just as it had also placed widows and orphans under their care and guardianship : and the emperors of the West had, since that epoch, expressly given to the Bishop a jurisdiction in all matters touching upon religion. This presumed object of the bishops might not unreasonably be called a religious one. It is true that through all the other causes of the Consistory the thread of religion runs broadly and distinctly.

¹ Edwards, p. 82.

² Troplong, p. 124, 125.

In testamentary matters it is of thinner fibre, and less obvious to the careless eye; but it exists, nevertheless, and is found in the pious, charitable, and friendly dispositions which the death-bed or its prospect prompts to the minds of most testators.

To carry out this object of furthering the payment of legacies under all circumstances, even legal informality included, as the Council which we have quoted so boldly proposed, it became a vital necessity that the Bishop should insinuate these informal wills at least, for the *Curia* would not; and we may comprehend how, after having attained the right to insinuate these, the necessity as well as advisability of transferring to his archives all other wills would follow almost *sans dire*. And if it be asked by what authority this so civil jurisdiction was transferred from the *Curia* to the episcopal *Audientia*, the question can easily be answered. The influence, official and personal, religious and secular, of the Gallo-Roman and the Frankish Bishop was immense; but it had been justly earned by him. He had been a good and conscientious judge (beyond what the Pagan world had either experienced or conceived) in all the matters which popular feeling had urged the emperors to confide to him. He had in their time also, as we have observed, exercised a voluntary jurisdiction in certain things, which were previously transacted before a civil judge only; and upon the fall of the Western Empire he had become *dominus* of his city—the head of the *Curia* and chief magistrate.¹ The Bishop's reasoning, and perhaps his wish, were of themselves, therefore, a sufficient guarantee to his fellow-citizens to confer upon him the registration of wills. This accession to his voluntary jurisdiction was given by the same persons who had elected and appointed him their bishop and *dominus*, and in the exercise of the same authority—viz. the citizens and their magistrates. The right of the Bishop, therefore, rests upon the best and most legal foundation which history has ever recorded; and the nonsense about episcopal encroachment in secular affairs becomes simply ludicrous, however gravely expressed or warmly urged. Indeed the latter may rather be said to have been the only matters in which the Church has not encroached upon the laity; and the charge

¹ Thierry's *Tiers Etat*, p. 15; and Troplong, p. 118, note.

makes a nearer approach to probability, and would have a better prospect of credence amongst educated persons, if it were applied to spiritual matters.

Such, and so distinct as we have stated, have been the origins of the two now united elements of the probate ; and it only remains to consider whether such a union is really necessary, or whether one of those elements may be disengaged and retained in a separate existence, while the other is discarded altogether. On the one hand, the advocates of what is now termed registration hold the proof and authentication of a will, and the granting of administration of a testator's chattels, purely *is ludibrio*. They ignore altogether the meaning and efficacy of such practice, and in their juridical creed acknowledge simple registration only. In fact, they admit of no real securities for the public. The case put by these gentlemen is, therefore, enounced clearly and intelligibly enough, and requires but a brief examination. Is simple registration, and no more, a safe or salutary principle, when applied to the circumstances of wills ? In other words, is the case of the latter instruments the same as that of deeds ? Is it such that a will can, with security to the public, be carried into an office merely receptive and ministerial, like the registries of Middlesex and the West Riding ? We think not ; for we can see no assimilation between the two cases. In the case of deeds, the sole object sought to be, and which can be, attained by registration, is the protection of third parties, whose interests might possibly be affected by secrecy and silence. It is not intended to secure the original parties themselves, for that is obviously unnecessary, as there exists a privity between them ; but this privity can, in the case of wills, be in no way traced between a testator and his legatees. In deeds, the seisin and possession is given by living persons to living persons ; in wills, it is given by the instrument alone, and without consideration, or stated and appreciable motive. Moreover, in the very nature of deeds there exist securities for the public which cannot be found in wills. In deeds, the supposed vendor or mortgagor may easily emerge and refute, by his own evidence, the act of the forger ; in wills, the defrauded heir or next of kin will need all the aid which protective and

preventive law can afford. But a look beneath the surface, such as a Court of Probate can give, in the exercise of voluntary jurisdiction merely, will often defeat the best-laid plans of the wholesale forger, and the partial interpolator.

It therefore follows, that while the deed requires no proof, the will requires much; and with proof there must be combined legal approval and authentication. Accordingly, we think that the *insinuatio* of the Roman *Curia* and the Ecclesiastical Consistory should be retained in its essentials.

In regard to the other element of the probate, there can, we think, be very little controversy or doubt that such a power should be vested in some Court, and that such power, also, should be discretionary and unfettered. A testator may in error appoint a bankrupt, a felon, or a fool, to manage, arrange, and settle his affairs; but the Ecclesiastical Court, bound by the indiscriminating rules of the Common Law, must obey and confirm such appointment without a murmur of exception. This is plainly absurd, and impolitic. We have seen that such was not always the practice in England, and historical tradition steps in and shows that the administration of a testator's estate should not be left absolutely to his own election and nomination; for he may be weak and ignorant himself,—he may be misled and blinded by others,—and in the last act of his life may defeat his most cherished intentions by the choice of a dishonest steward. A Court, therefore, should have a controlling and supervising power over testamentary appointments of executors. If the testator appoint a good and trustworthy person to the office, the appointment should, of course, be confirmed; but if the executor be criminal, notoriously fraudulent, or mad, it is manifestly for the true interest of the public that a Court, with administrative powers of its own, should interfere, and not only supersede a testator's mistaken choice, but should also appoint a better minister in his stead.

H. C. C.

ART. III.—ON THE MEASURE OF DAMAGES
EX DELICTO.

A Treatise on the Law of Damages. By JOHN D. MAYNE, Esq.,
Barrister-at-Law. London: H. Sweet, Chancery Lane.

THE publication of a modern treatise on damages affords us the opportunity of redeeming our promise, made now some time ago, to complete our notice of the Law of the Measure of Damages.¹ At the same time, we have pleasure in directing the attention of our readers to Mr. Mayne's book, as going far to supply that deficiency which we, in our former article, pointed out as existing in this department of the law. All the cases bearing upon this extensive and interesting question have been brought together by the author with great industry and considerable acuteness; and his intention throughout has clearly been, not to make a book that might fall into Story's bitter category of English law-books; viz., "A full Index of Reports, arranged under the appropriate heads, with the materials tied together by very slender threads of connection," but comprehensively to grapple with, and thoroughly to illustrate, his subject. As our chief object now is to touch on the measure of damages awarded in the principal kinds of action in tort, we shall not go into the details of Mr. Mayne's book further than may be necessary or convenient to illustrate this class of damage; but we may say generally, that if the matter of the book be not wholly new, its arrangement is undoubtedly novel and convenient: that if the author's own disquisitions are not so full as might be desired, they are terse, vigorous, and sensible; and that the whole work forms not only a very readable book, but also a valuable book of reference for the student and the adept.

The most important difference between actions *ex contractu* and actions *ex delicto*, as regards the assessment of damages, is, that in the former juries are forbidden, but in the latter are allowed and encouraged, to take into consideration the inten-

¹ See No. cvii. of the *Law Magazine*.

tion and motive of the defendants. All the circumstances of the case are submitted to their cognizance; and in such actions as libel, trespass, and crim. con., the Courts will not interfere with their verdicts, unless it can be shown that the jury have been actuated by some wrong principle, or have fallen into some mistake of fact. This was not always so. "You were daring enough," says Junius, addressing Lord Mansfield, "to tell the jury that in fixing the damages they were to pay no regard to the quality or fortune of the parties; that it was a trial between A. and B.; that they were to consider the offence in a moral light only, and give no greater damages to a peer of the realm than to the meanest mechanic." This was the case of *Lord Grosvenor v. The Duke of Cumberland*, tried in 1768; and the judge was wrong, and his assailant right; for in the well-known case of *Wilford v. Berkeley*, decided by the full Court ten years before (see 1 Burr. 609), it had been held that in cases of crim. con. all "the circumstances were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate." "In fact," as Mr. Mayne says (p. 14), "if any other rule existed, a man of large fortune might, by a certain outlay, purchase the right of being a public tormentor; he might copy the example of the young Roman noble mentioned by Gibbon, who used to run along the Forum, striking every one he met upon the cheek, while a slave followed with a purse, making a legal tender of the statutory shilling!" But even in actions *ex delicto*, whenever the judges can find data for measuring the damages, they always take care to lay down rules on that subject. Thus in trover, juries are directed to give the value of the article not at the time of trial, but at the period of its conversion.—(See *Read v. Fairbanks*, 18 C. B. 692, which conflicts, however, with *Greening v. Wilkinson*, 1 C. & P. 625.) Again, where the damage is said "*not naturally to flow*" from the wrongful act (a phrase, by the bye, which is about as unintelligible to us as the now exploded phrase of "circumstances which ought to excite the suspicion of a prudent man"), such damage is excluded by the judge from the contemplation of the jury, as "too remote." The learned authors of the last edition of *Smith's Leading Cases* (see vol. ii. p. 430)

admit "that the application of this rule to the varying circumstances of different cases is sometimes attended with great difficulty;" and our readers, after comparing the cases of *Vicars v. Willcox*, 8 East, 1, and *Knight v. Gibbs*, 1 Ad. & Ell. 43; *Siordet v. Hall*, 4 Bing. 607, and *Blythe v. Birmingham Waterworks*, 20 Jur. 334; *Ashley v. Harrison*, 1 Esp. 48, and *Lumley v. Gye*, 2 E. & B. 216, which we have culled at random from our note-book, may be inclined to agree with the admission. Again, in actions for malicious arrest or prosecution, after a long contest it was settled, by the case of *Panton v. Williams*, 2 Q. B. 169, that the question of "reasonable and probable cause" was for the judge, and not for the jury. In practice, however, the judges, by their disinclination to deal with these cases, show rather a disposition to "flee the monster their own hands have made;" and Baron Martin, in *Dendy v. Henderson*, 11 Ex. R. 199, professed his inability to understand how the question of reasonableness could be one for the Court to decide. It may be doubted whether these Procrustean rules do not rather impede justice than otherwise, and whether Sedgwick has not rightly said (see p. 16 of his *Treatise on Damages*) that "arbitrary rules, especially when used to fix values, are always a misfortune and a defect in jurisprudence." It may be a great question whether it is not matter for regret that any exception should ever have been allowed to the old rule, "*ad questionem facti respondeant juratores*." If new trials are to be awarded because judges may differ from juries on occasions where men of sense and justice may reasonably differ from one another, such a proceeding is the substitution of judicial authority in fixed magistrates, for the discretion lodged by the Constitution in the popular jurisdictions of the country. It is the boast of a free people, that only the verdict of their equals can deprive them of their life or property. The "*nisi per legale iudicium parium, vel per legem terræ*," of *Magna Charta*, breathes the same spirit as the Roman Law. "*Neminem (says Cicero pro Cluentio, 43) voluerunt maiores nostri non modo de existimatione cujusquam, sed ne pecuniariâ quidem de re minimâ, esse iudicem, nisi qui inter adversarios convenisset*." Under the Saxon rule, the damages recoverable for various injuries were

sums fixed by law. And no one can have had much experience in our own courts without being aware of the deep dissatisfaction felt by the public, and especially by the mercantile world, with the rules about damages laid down by the lawyers. They feel that on these points they are submitting,—*not* to the law of the land,—*not* to the judgment of their equals,—*not* to the judgment of men peculiarly or particularly conversant with the subject-matter of the action;—*but* to certain theoretical and arbitrary rules, which are too sophistical and refined for the exigences of ordinary every-day life. Hence the demand for Chambers of Commerce, mercantile arbitrators,—“conseils des prud’hommes.” It was impatience of this kind that, at length warming into indignation, demanded the passing of the famous Libel Act in 1792; and we think it not at all improbable that, as the public come more fully to understand who are the real authors of the rules by which the measure of damages is at present regulated, a determination to submit no longer to “judge-made” law will produce another statute defining and regulating the true office of judges and juries.

And it may be another serious question whether a jury be not a more satisfactory, as well as a more constitutional, tribunal for the assessment of damages than any judge, however eminent in talent, or liberal in his sympathies. Doubtless it has been the habit for a long time in legal circles to sneer at the “intelligence” of juries; but to persist in these days in that sneer can only be because it *has* become a *habit*. There may still be remote parts of the country into which the light of education has not yet penetrated; but we believe that the average of modern juries are as likely, or more likely, to come to a decision consistent with right reason and common sense, than, or as, any one, or any four, of the occupants of the judicial Bench.

The judges are men; but they never forget that they are on a pinnacle above their fellow-men. The Lethe, which is said to run between the Bench and the Bar, swells into a wider stream where it divides the Bench and the suitors. We must not be understood to complain of this, for it is, perhaps, only consistent with what Bishop Butler calls “the course of

nature;" but we conceive it to be a sound argument for not intrusting judges with the assessment of damages. There was a late case, within, perhaps, the memory of some of our readers, where a seamstress, who gave her name and address, was ignominiously paraded through the streets and locked up all night on a false charge of passing bad money; and yet a learned judge, who admitted that it was a case for exemplary damages, and who must, or ought to have known, that £10 would not cover the plaintiff's costs as between attorney and client, actually awarded her this pitiful sum only, when the amount of damages had by consent been left to him. We believe a jury would have given ten times the amount. Further, we believe that the exceedingly small number of actions tried under the last Common Law Procedure Act by judges sitting alone, without the intervention of juries, is some test of the feeling of the public on this subject. We had intended to notice several other interesting points in the Law of Damages in actions for torts, particularly the proceedings under the Lands Clauses' Consolidation Act, and the 9 & 10 Victoria, cap. 93; the damages in trover, where the *status* of the article converted has been changed, and where several parties are liable for the conversion. Want of space, however, forbids our doing more than referring our readers to Mr. Mayne's treatise on these points (see pp. 89, 207, 214, 242—252, and 294), where these matters are ably handled. There is one other point on which we must quote Mr. Mayne:—"In fact," he says at p. 37, "the whole law upon the subject of damages in the case of continuing nuisances or trespasses seems in a very unsatisfactory state. Suppose the defendant to have built a house on the plaintiff's ground,—this is a continuing trespass; and as long as it lasts, the plaintiff may bring fresh actions, and obtain fresh damages. Indeed, he must do so, because it would appear each action can only reimburse him for the loss sustained up to its commencement. The defendant cannot protect himself against this succession of attacks, because, even if it were his desire, it is not in his power to enter the plaintiff's land, and put an end to the nuisance himself. The fair rule in such a case would be, to give the plaintiff such damages as would compensate him for

the loss sustained up to the time of verdict, and would pay him for putting the land into its original state. If he chose to leave the trespass after this, it would clearly be because he thought it advantageous to himself; and if so, he ought not to be allowed to sue again. There is one case which is almost in accordance with this view. It was an action on a covenant to repair premises, and judgment for plaintiff on demurrer. The premises had got into worse repair since the commencement of the action, and the jury in assessing damages computed the expense the plaintiff had been at in doing repairs which became necessary between action brought and writ of inquiry. The judgment upon this point was affirmed in error. It is quite clear that in this case there was a new breach of covenant in allowing the premises to go into worse repair since the issuing of the writ, for which a new action might have been brought, and new damages recovered. The jury, however, took the common-sense view of the matter, and gave, as every jury practically does, such damages as would reimburse him for all loss incurred up to the time the case came under their cognizance."

We have made no specific mention of damages in actions for crim. con. and seduction, and purposely. We fully concur in the opinion lately expressed by Lord Campbell as to the action for crim. con. being a foul blot on our system of jurisprudence, and on our national character, and hope most sincerely that we may at last indulge in the anticipation of such a blot being speedily erased. But as we entertain precisely the same opinion of the action for seduction, we regret that the same statute does not abolish this also. It is not easy to discover how or when they arose. Adultery and fornication were originally punished by fine and imprisonment (see 8 Inst. 205), and there seemed no trace of these actions until after the Restoration, when the imprisonment was done away with, and the amount of the fine was probably thought more capable and proper of ascertainment by juries, who then, by legal fictions, obtained the cognizance of these offences. But there can be little doubt, apart from all higher considerations, if damages are, as Blackstone and Sayer have truly defined them, "a pecuniary re-

compense, a compensation and satisfaction for an injury sustained,"—that the giving damages for seduction or crim. con. is but a mockery of justice, and a mere miscarriage of law.

ART. IV.—AMERICAN FACTION—MOB INTER- FERENCE WITH JUSTICE.

WHEN Washington, sixty years ago,¹ pronounced to his countrymen, on his approaching retirement, that memorable address which has always been regarded as standing at the very head of state papers for the wisdom of its counsels and the severely impressive dignity of its language, he solemnly warned them against the evils of party, and more especially of party grounded on geographical distinctions, as if he had foreseen whence must, sooner or later, proceed the great danger of the Union being dissolved. But he did not perceive, or did not venture to touch on, the shape which that danger would assume; on the contrary, he describes the American people as having, "with slight shades of difference, the same manners and habits;" no less "than the same religion and political principles." How little then could he have believed it possible that the spirit of party, in its most hateful form, with the worst passions which selfish propensities can engender, would, within the period of one generation, have inspired a portion of the people with a fanatical fury never before excited upon any matters of merely secular concernment! The spectacle which the United States at present exhibit in this respect is unparalleled in the history of human folly and human guilt, and it is fitted to inculcate, with tremendous force, the wisdom of Lord Denman's alarm at all interference, how slight soever in its commencement, of the multitude in the administration of the law; for we see in what excesses it may end. When the galleries (tribunes) at Paris

¹ 17 September, 1796.

began feebly, even respectfully, to express their applause at the debates of the National Assembly, it might not have been expected in the Convention that those galleries and their allies from the streets would end by having the entire control over the proceedings of the members themselves. The American mob in like manner—

“*Parva metu primo, mox sese attollit in auras,
Ingrediturque solo*”—

Nor can it be said that it does not exercise a portion at least of the functions of the Government. It is no doubt necessary to receive with distrust all the accounts which have reached Europe of late transactions, because there may be supposed to exist as much prejudice on the one side as on the other. But it is certain that the Pro-Slavery men (as they term themselves, somewhat ostentatiously) far from concealing, or at all softening, the repulsive features of their violence, appear rather disposed to exaggerate the acts to which it gives rise; so that we can have little hesitation in trusting to the accounts of their proceedings.

The condition then of the districts where the contest prevails appears to be this. Armed multitudes assemble, with more or less of discipline, but always acting in concert, or only differing in their plans and operations, as some may be more furious in their violence than others. They attack the settlements of those who refuse to admit of slavery as part of their institutes; sometimes they are repulsed, sometimes they succeed; they stop not short of shedding blood; and either put their antagonists to death in the combat, or after their victory; and not seldom they seize and imprison, or kill, individuals or families without any fighting, merely making an irruption with the design of doing mischief, and without the hope of keeping possession. The same town has been several times taken, retaken, pillaged with bloodshed before being abandoned; or retained, and the greatest cruelties inflicted upon its inhabitants. The force, whether of peace-officers or militia, of the Government is sometimes in conflict with them, but it has generally been unable to cope with them. There is every appearance of it having been exerted without zeal, and perhaps only colourably and

collusively. The electioneering manoeuvres of the retiring President and his colleagues are more than suspected of being addressed to the Pro-Slavery interest. But the degree in which this slavery enthusiasm prevails, and the openness with which those subject to its influence avow it, can best be seen in a single, though a most remarkable, incident that has lately occurred, and excited, as well it might, unusual attention both in the United States and in Europe. A senator of great respectability, and looked up to as one of the most distinguished party chiefs, Mr. Sumner, a gentleman well known too, and highly esteemed both in England and in France, had made some remarks, in the course of a debate, upon the slavery question, and the conduct of a South Carolina gentleman as connected with it. The nephew of that individual, Mr. or Colonel Brooks, endeavoured to find Mr. Sumner, in order to insult him and provoke a personal quarrel, that is, a duel; but he failed to meet him:—we are now giving his own account of it, not Mr. Sumner's. Resolved to wreak his vengeance upon him at all hazards, he entered the hall of the Senate just after the meeting had ended, and when no one remained save Mr. Sumner, who was seated at his desk, and, from the construction of the benches, wholly unable to rise suddenly if assailed. After a few words of question as to his speech, he made a furious assault on the unarmed, defenceless man, thus unable to rise, and with repeated blows threw him bleeding on the ground, from which he was with difficulty raised by two senators, who appear not to have interfered at the moment of the attack, possibly from observing the state of rabid excitement in which Brooks was. But it appears quite certain that one, if not two, of his Pro-Slavery associates were present, who might have restrained him; and one of them, a fellow member of the House of Representatives, has avowed that he did not choose to interpose, because he entirely approved of the attack. Mr. Sumner's wounds were so severe, that they have been pronounced dangerous, and supposed to make his recovery doubtful. On this we offer no opinion, nor is it necessary. Whether or not his life has been endangered by the outrage is immaterial; because the fact of the wounds having been most severe is not merely

admitted, but is made the ground of exultation by the personal friends and political partisans of the wrongdoer. The fact then is, that a member of one house comes armed to attack a member of the other unarmed, for words spoken by him in debate as a senator, and in the discharge of his public duty; that he inflicts upon his defenceless adversary heavy and dangerous injuries; and that he and his friends glory in this outrage, because they are zealous friends of negro slavery, and their adversary opposes, not the continuance of that negro slavery in the old states where it has long been established, but the extension of it to new settlements, and the adoption of additional slave states into the Union.

Such then being the fact, how do the Americans act upon it? Of course the Anti-Slavery party side with Mr. Sumner. Meetings are everywhere held to express the public indignation at an outrage unheard of even in the slave states and their border-neighbours, because the extraordinary circumstances of the place and time of the assault,—the assailant being armed and his victim defenceless,—had probably never before occurred to complicate the case; and thus, what on ordinary occasions would have been a duel with rifles, or perhaps a violent personal attack in the street or other public place, had now assumed the more hateful form of a deliberate assassination, and by a legislator upon his fellow member. In the new states, where civilization had made little progress, outrages have been witnessed, such as assaults, and threats of murder, even used by, or to, the personage presiding over their assemblies. Such at least have been the reports frequently circulated in Europe, and generally credited, though with some suspicion of the circumstances being exaggerated. But the outrage now exhibited to the wonder of the civilized world was committed at the capital of the Federal Union, and within the walls of the Congress, by a member of that great central Legislature, in the presence of his fellows,—and committed by those representing the state longest established, and making the greatest pretensions to civility and refinement, to purity of blood, high lineage, and aristocratic descent. There could, therefore, be no doubt of the universal feeling of horror which this outrage would excite, wherever the people were not

blinded by the passions of party or the prejudices of supposed interest ; but that even these causes of perverted sentiment should make the men of the South callous to all sense of humanity, nay, of reason, and should not only repress every disposition to reprobate, but actually band them in an unnatural combination to approve, even to side with, the wrongdoer, to hail him with admiration, and exalt him into the position of their champion and hero, does seem so incredible a result as gives to the powers of popular delusion a novel aspect. Addresses were presented in this sense to Col. Brooks ; meetings held to pass resolutions in admiration of his conduct ; presents tendered to him with inscriptions referring to his offence, such as any man of honourable feelings, or of a manly spirit, would have disdained to receive ; and some of the highest public functionaries actually set their names to those odious and despicable documents. It may fairly be questioned if Washington had a right in his address to represent all parts of the Union as having, " with slight shades of difference, the same religion." But when the multitude is excited and appealed to, nay, when the authorities of the State appeal to its most ignorant and unprincipled, and unreflecting members, and suffer themselves to be guided or controlled by their violence, even where they are not partakers of it, we greatly underrate the evil, if we say there is no government, nor anything deserving the name ; there is a rule of the very worst kind, to which any regular form of polity, however bad, is greatly preferable ; there is the despotic sway of the worst passions in their most violent excitement. The friends of humanity can only wish that this state of things may not end in a disruption of the American Union, which would leave one part of the continent permanently under the unmitigated dominion of such evil, such frightful passions. Above all, such a consummation being brought about by the controversy on slavery is to be deprecated, on account of the unhappy negroes, who most probably might be betrayed into revolt ; and if that would be pernicious to them in settlements where they form the vast majority of the inhabitants, how much more dreadful must it prove where the whites, and free people of colour, are in greater numbers ?

From the horrid prospect which such events present we

gladly turn away, and proceed to remark that the evils which have befallen the American States having their origin in the multitude's interference with the executive government, and more especially with the administration of justice, teaches us to reflect upon that which forms the great objection to all such interference,—the permanent mischief of any power whatever being exercised where there is no responsibility, that is, no personal and individual responsibility. Public functionaries, intrusted more or less directly with the government of a country, are answerable in their own persons for their acts, whether of advising or executing measures, because they are known, and can be visited with punishment, from the lightest—that of mere censure and public odium—to the heaviest. Even in despotic countries, the tyrant and his servants are not safe; and the aristocracy, in some respects more free from risks, are so little exempt from them, that at Venice they had to court the popular favour. But the multitude is wholly irresponsible, because none can ever tell who caused its excesses; and hence the measures which found favour in its eye one day, may the next be the objects of its indignation, from this entire want of personal identity.¹ So, judges are known and are responsible; juries are so, though in a somewhat less degree; but if causes are to be decided according to what is called public opinion, no one can tell who dictates the decision. In some parts of America the mob take the law into their own hands, and execute summary justice, as it is termed, but in truth gratify their own violent passions, and commit murder, in the name of law. There is no fear whatever of such excesses spreading generally even in those countries; in ours it is wholly impossible. Yet let us beware how we give encouragement to that which approaches, though only at a distance, to such a consummation; let us carefully guard against the interference of what is called public opinion, that is, the popular voice, the voice

¹ It may be said that these remarks can hardly apply to the proceedings of the Pro-Slavery men, inasmuch as the actors in the mob-outrages, glorying in their shame, come forward in their own persons, and claim not merely impunity, but applause. But the present state of things is that of multitudes under the influence of permanent excitement from a fanaticism that lays their reason asleep. The mischief began long ago, and it then assumed a more retiring form: the mob power only has reached its present supremacy by slow degrees.

of those who have not by possibility any accurate knowledge either of the fact or of the law, and who are not in the calm state of mind which fits it for forming a dispassionate judgment.

We have lately, in several cases that excited great interest, observed a tendency to make the feelings of people out of doors bear upon the course of justice,—sometimes before trial; more frequently while the exercise of the prerogative of pardon was in suspense. The strong feelings, partly religious, of some sectaries, frequently lead them to extreme agitation against the infliction of capital punishment; and their strenuous efforts have not always been unattended with success. We know not if to this cause was owing the remission of punishment lately in the case of an atrocious murder, committed by a woman of perfectly sound mind upon her own daughter, with circumstances of aggravation; but assuredly, unless this mitigation of the sentence received the full sanction of the judge who tried the cause, it amounts to a virtual declaration that capital punishment is at an end, and that none hereafter shall undergo it.

The conviction of Palmer has given rise to somewhat of the same agitation, which, though much less extensive, was yet sufficiently remarkable. Several newspapers took up the subject, and a letter was addressed to Lord Campbell, the presiding judge at the trial, as written by a reverend clergyman, brother of the convict. This pamphlet, which was industriously circulated, and copied into one, at least, of the London daily papers, contained a violent, and in some particulars an indecent, attack upon the learned judge, whose conduct, as well as that of his two brethren, had been throughout marked with the greatest impartiality; and who had, so far as he gave any opinion to the jury, only given the same opinion which every unprejudiced person formed who had heard the evidence. The object of these attacks was to obtain a respite, in order to examine further evidence. But no one could read the pamphlet and doubt that it proceeded from a professional man; and the suspicion was strong that the reverend author had only lent his name. He afterwards came forward and denied that it had ever been published with his authority; but it must be observed that he forbore making this statement until it might be expected that the

use of his name had been serviceable to the cause. We ought to visit this misconduct, though of a clergyman, with our disapproval as gently as may be, regard being had to the cruel position in which his brother's crimes and his fate had placed his unfortunate family; but for the professional men who were guilty of this fraud there is no excuse, any more than there is for their slanderous attack upon the Bench. It is probable that no member of the profession would have come forward in his own person as the author of such a work; and this is only another instance of the mischief arising from the interference of unknown and irresponsible persons with the administration of justice. It may no doubt be urged that this case affords also a proof how another name than the author's might be used for the purpose of concealing him. But though in the peculiar circumstances of the parties here, there might be an impossibility of enforcing any strict enactment, fenced by severe penalties, requiring the disclosure of the real author as a condition precedent to the power of publishing, it is clear that in ordinary cases the use of a false name could be rendered next to impossible by the fact that the publisher would be at the mercy of the person, *ex hypothesi* a person of very indifferent character, who had lent his name, and practically the concealment of the true author would become impossible. Suppose, for example, that the author of the wholly inexcusable attack on the judges, aware of the risk he ran of losing all character in the profession, had obtained leave, for a sum of money, from some needy man to use his name; and suppose that, beside the penalty which the law might annex to this conspiracy, that loss of caste were the consequence of the plot being discovered, can any one doubt that the man of straw would, as long as the professional *gentleman* continued on the Rolls, or at the Bar, have the power of relieving at his expense those necessities which had induced him to lend his name? When the real author weighed all the risks to which he exposed himself, and contemplated the intolerable life he would lead, under the constant dread of exposure, and in the frequent purchase of temporary security at a heavy price, he would in all probability decline the step of publishing; and

the result would be, that the scandalous pamphlet would not appear.

It is on no account intended to call in question the greatest freedom—if you will, even license—in commenting on the conduct of judges, as well as of all other public functionaries. But is it indispensably necessary to this freedom, that the assailants, or the critics of those eminent persons, should wear a mask ; and while the objects of their vituperation, or censorial remarks, are exposed to the view of all mankind in their proper persons, without the least disguise, and in their own persons responsible to the world for errors and for faults, their assailants should lurk in the dark, and be very possibly such that the bare mention of their names would at once disarm their assertions of all credit, their opinion of all authority ? The same may no doubt be said of other attacks, of censures pronounced upon public men in other—as in political—departments ; and the argument is certainly general. Yet to the case of judicial proceedings it has a peculiar application, not only because of the extreme importance of maintaining the authority of courts of justice, and indeed of the law itself, more especially the Criminal Law, but because judges, from their position, are wholly unable to defend themselves against such attacks. A minister of state and a party leader have the constant opportunity of repelling whatever assaults may be directed against their public conduct. Even official persons in more obscure positions never fail to find defenders among their parliamentary friends. But it is certain, that whatever severity of censure may be shown towards judicial characters, there is a disposition to regard the whole discussion as a kind of incident to, if not part of, judicial proceedings, and to leave the judges undefended. This, indeed, is partly owing to the nature of the questions upon which their conduct is arraigned. Matters of a legal, indeed of a technical nature, are familiar to so few, that they are avoided in debate ; and were they brought forward, would have very little chance of receiving attention.

There is, however, a further reason for making a distinction between judges and all other persons in respect of such discussions as we are now considering ; and this reason appears to be decisive in favour of some restriction being imposed for their

protection. Not a day passes in any court of justice, civil or criminal, without one or more parties having the determination of the matter in dispute given adversely. The party or parties in the civil court lose their cause; in the criminal they are sentenced, or, if they prosecuted, they have to bear the acquittal of the defendant. All these disappointed persons may not be so unreasonable as to believe that injustice has been done by the judge; but assuredly a considerable proportion of them are entirely convinced of it. Nothing but the unwillingness of those who conduct newspapers to fill their publications with the complaints of parties, which would indeed exclude every other matter, prevents the daily appearance of attacks upon all the judges. But when there is a case of an interesting kind, or when an able and impressive article is sent, the chances are that it will appear in the papers. No objection can be made to this, provided the reader is made aware of the quarter from which the attack on the judge proceeds. But it is given without any name, and it may very possibly be the work of the party against whom the decision was given, or of his counsel or attorney. The public is deceived, if kept in ignorance of a fact which, when known, would deprive the censure upon the Court of all importance. Requiring the author's name, too, would not prevent fair, entire, and respectful discussion, even by the members of the Profession. That kind of attack would alone be prevented, in which no reputable practitioners could wish to indulge. We throw out these reflections for the consideration of our readers, and of the Profession at large. The only question is respecting newspaper discussion; and the fullest scope, even to anonymous writing, might safely be given in all the other channels through which the public can be addressed.

ART. V.—PEERAGES FOR LIFE.¹

THE Bill for improving the Appellate Jurisdiction of the House of Lords, passed by the Upper House, but which, having been referred to a select committee, has been virtually rejected by the House of Commons, has revived public interest in the important constitutional question raised on the creation of Baron Parke a peer for life.

We propose, therefore, by the aid of the materials afforded by the discussions in Parliament and elsewhere, and premising that we do not pretend to any original research on a subject which has been already so much exhausted, to place before our readers a brief summary of the different reasons and arguments which have been advanced either by the supporters or opposers of the prerogative in question.

The arguments on this question have divided themselves into three heads : first, whether the prerogative of creating peers for life be legal ; secondly, whether it be constitutional ; and, thirdly, is it expedient that, if the alleged right exist, it should be exercised ?

We shall treat of these arguments in their order. And, first, as to the strict legal right to create peers for life. And here it may be desirable to remark on the difference between a strictly legal act of prerogative on the part of the Crown, and that which is also constitutional. Every right which is constitutional must, of necessity, be also legal ; but every legal act on the part of the Crown is not also necessarily constitutional. For instance, as observed by Lord Lyndhurst,² "The Sovereign may by his prerogative, if he thinks proper, create a hundred peers with descendible qualities in the course of a day. That

¹ The question respecting the power of the Crown to grant a life peerage, entitling its recipient to sit in Parliament, is so important, that we readily insert the following paper containing a sketch of the arguments, *pro* and *con*, which have been urged in regard to it ; not, however, altogether identifying our own opinion with that which in the following pages is presented.—ED.

² Hansard, vol. cxi. p. 265.

would be consistent with the prerogative, and would be strictly legal ; but everybody must feel, and everybody must know, that such an exercise of the undoubted prerogative of the Crown would be a flagrant violation of the principles of the Constitution. In the same manner the Sovereign might place the great seal in the hands of a person, a layman, wholly unacquainted with the laws of the country. That also would be a flagrant violation of the Constitution of this country." "Now what is illegal," says Lord Brougham,¹ "cannot be constitutional ; but things may be quite legal, and yet unconstitutional—that is, inconsistent with the principles, and, as it were, the spirit of the Constitution, tending to an infraction of its laws, a raising an obstruction in the way of their execution, a leading to the making of new laws, inconsistent with its nature and fabric."

The great authority in favour of the legality of the creation of peers for life by the Crown is that of Lord Coke. Lord Coke says :²—"And as an estate for life may be gained by marriage, so may the King create either man or woman *noble for life*, but not for yeares, because then it might goe to executors or administrators. The true division of persons is, that everie man is either of nobilitie, that is, a Lord of Parliament of the Upper House, or under the degree of nobilitie, amongst the Commons ; as knights, esquires, citizens and burgesses of the Lower House of Parliament, commonly called the House of Commons ; and he that is not of the nobilitie is by intendment of law among the Commons." To this passage there is appended a note, the authorship of which has been the subject of much controversy. As it occurs in Mr. Hargrave's portion of Coke upon Littleton, it has been attributed to him, while, on the other hand, it is contended to be by Mr. Butler, or most probably by neither, but by some anonymous hand. The note is important, because it contains a passage controverting the opinion of Lord Coke. The passage is as follows :—"Notwithstanding Lord Coke's position here of the King's power to make a man or woman noble for life, and his stating in his 9 Rep. 97, 98, the King's power of making an earl for life, and notwithstanding the precedents I have cited above of creation for life,

¹ Hansard, vol. cxi. p. 1195.

² Co. Litt. 16 b.

I doubt whether the legality of such creations can be supported; I am rather impressed that the quality of being hereditary is of the essence of our peerage, and that attributing to the King a prerogative of creating peers for life only, is to invest the Crown with a power of gradually destroying the peerage in its subsisting state, which I believe is *de facto* such as not to furnish an instance of a peer sitting as a Lord of Parliament under a life interest. The point seems to me one of great importance. I am not aware that it ever was judicially determined." It is here important to remark, that it has been contended that Lord Coke merely refers to the grant of the dignity of peer for life, and not to the privilege of sitting in the House of Lords. This view is advocated by Mr. Lewis, in an able paper read by him before the Juridical Society, on the 4th of February, and before the debates on this subject in the House of Lords. This part of the question is so important, that we give Mr. Lewis's reasoning on the subject in his own words:—"It is,"¹ observes Mr. Lewis, "undoubtedly important to ascertain clearly, if we can, what Coke's mind was upon the nature of peerages created by patent. After carefully examining the various passages in his Commentaries, it seems to me that Coke was clearly of opinion that a man cannot be created a *Peer of Parliament* for life, or otherwise than for an estate of inheritance.

"He first tells us,² that previously to 11 Richard II. creations of nobility were by writ, but so that the man called by writ became ennobled to him and his lineal heirs *by taking his seat in Parliament*, otherwise the writ had no operation. In 11 Richard II., Beauchamp was created noble by *letters patent*. Coke says that the difference between the two modes or forms of creation is this, that by letters patent a man is ennobled *without taking his seat in Parliament*. There is no intimation here that letters patent were a form for creating a *different kind of peer* from that formerly created by writ. On the contrary, Coke tells us, that, 'if he be created by letters patent, *the state of inheritance must be limited by apt words, or else the grant is void.*'

¹ Papers read before the Juridical Society, vol. i. pp. 159, 160.

² Co. Litt. 16 b.

"If now we turn to 9 *b*, we find, 'If he be created by patent, he must of necessity have these words, 'his heirs,' or 'the heirs male of his body,' or 'the heirs of his body,' &c.; otherwise *he hath no inheritance*. We cannot infer from these words that a Peer of Parliament may, by letters patent, hold his state of nobility for life only, when we have the *express* declaration that such a grant is void. Coke is not here treating of *what estates* may be granted by letters patent, but discussing the difference between the forms of a writ and of letters patent, *in relation to the estate of inheritance to be given*; namely, that to give the inheritance by letters patent, there must be apt words.

"The only inference that can be raised from this expression, 'otherwise he hath no estate of inheritance' (*if any must be raised*), is that, as held in *Sir George Reynel's case* (9 Co. 97 *b*), regarding a count or earl, in his capacity of having *the custody of a county*, 'the King may create an earl for life, in tail, or in fee;' and so, perhaps, of nobilities, in relation to precedence, office, or other distinctions, which are properly subjects of creation by patent, and to which a writ has no relation.

"That no other inference can be raised on the passage at 9 *b*, appears from a *careful* reading of the continuation of the passage at 16 *b*, where Coke observes, 'that nobility may be granted for term of life by act in law;' and 'so may the King create either man or woman noble for life;' the authority for the latter position being *Nevil's case*. The following words show how Coke regarded these life dignities; for he says, that 'the *TRUE* division is, that every man is either of nobility,—that is, a Lord of Parliament' (meaning the nobility of inheritance gained by taking a seat under a writ, or by letters patent with words of inheritance), 'or under the degree of nobility, amongst the Commons.' This, taken in connection with the opinion that a grant for life is void, shows that Coke considered life titles *anomalous*, as opposed to the *true* division; that is, he considered them as giving nobility without making a Lord of Parliament.

"Coke, on the whole, lays down three propositions:—

"1st. As to *words of inheritance*. That while a writ with-

out words of inheritance creates a man a peer of inheritance, letters patent cannot do so without words of inheritance.

"2nd. As to *the creation of a Lord of Parliament*. That while under a writ a man becomes a Peer of Parliament of inheritance by taking his seat, letters patent, with words of inheritance, make him one without his taking his seat; but that letters patent, to create a Peer of Parliament without apt words of inheritance, are void.

"3rd. As to *the division of the people*. That while a man may be created noble for life, the true division is between Lords of Parliament and Commons."

Since the opinion of Lord Coke upon this subject is of so much consequence, we shall trouble our readers with the opinions expressed on the point by the different law lords in the course of the debate on this subject in the House of Lords.

Lord Lyndhurst said:¹—"My lords, I shall now refer to an opinion upon this portion of the subject which, I am sure, from all that I have heard, is likely to be pressed upon your attention,—I mean the opinion of Lord Coke. He has laid it down that the Crown may, by its prerogative, create a peerage for life. I have before stated, however, that the question is not what the Crown may do by its prerogative. When I was speaking upon this subject the other day in conversation with a noble and learned friend of mine, he said, 'Why, the Crown, by its prerogative, may send for a troop of Guards, and make every one of them a peer with the title descendible to his heirs; but that would be a gross violation of the law of the Constitution of this country, although every act of that description would be within the prerogative, and would be strictly legal, and in accordance with the technical rights of the prerogative.' But, my lords, I would warn you not to place more reliance upon the opinion of Lord Coke than it is justly entitled to. I know that in the reign of James I. a public charge was made against him that he laid down a great deal of law on his own authority, without sufficient vouchers for the views which he took; and I know that in matters relating to the peerage he was considered as by no means infallible. It is remarkable,

¹ Hansard, vol. cxi. pp. 272, 273, 274.

too, that in the very book in which Lord Coke lays down the law in the manner that I have stated, his commentator, Mr. Hargrave,—a gentleman of great and profound learning, than whom no man that ever lived was more conversant with the law of the country,—in his commentary upon the text, states that he does not think that that opinion can be sustained; he does not consider that the opinion is, in point of law, established by any sufficient authority; and he strongly excepts to the text of the learned author, and concludes by referring to a case to which I am about to direct the attention of your Lordships. It is a long case; but I will place it before your Lordships in a very simple form, so that it will be easily understood,—it is the case of Viscount Purbeck. The question was whether a peer could surrender to the Crown his title. The case occurred in the time of Charles II., and it was argued at great length and with great ability by Sir William Jones, the then Attorney-General. In the course of his argument he stated, by way of drawing a deduction from it, that the King, by his prerogative, could create a peer for life; and he illustrated the main question by arguments built upon that assumption; the learned judges who decided that case in this House were men of very great eminence,—the Earl of Shaftesbury, who had just given in the great seal, and the Earl of Nottingham, by whom he was succeeded. The Earl of Shaftesbury might, from his previous career, have been in some degree deficient in legal acquirements; but as an expositor of the great principles of the Constitution never any man stood higher. Need I remind your Lordships of those forcible lines, descriptive of this high judicial character, which occur in the works of our great master poet Dryden? When that learned judge came to pronounce judgment on the case before him, he referred to the assumption which had been made by the Attorney-General as to the King's right to create a peerage for life; and he said, 'Sir, you have assumed that which you had no right to assume. The assumption of that question is more difficult and obscure even than the main question which it was intended to illustrate.' It was, in fact, arguing upon the rule of *ignotum per ignotius*; and it is quite clear from the concluding remarks of that emi-

nent and great man, that he considered, even at that day, that the right of the Crown to create a peerage for life was not only doubtful, but that it could not, in point of law, be sustained. No man ever sat on the woolsack of greater eminence than Lord Nottingham, the then Chancellor. He, in his judgment, supported the argument of Sir William Jones, and came to the conclusion that the surrender was lawful. He adopted most of the arguments of the learned Attorney-General, but he passed over that one to which I have referred; thereby showing, in the most marked manner, that he agreed in opinion with the learned lord who had preceded him. Having made these observations upon the opinion of the Lord Chancellor, allow me to proceed one step further. In a case before this House,—the Waterford peerage case,—which was heard when Lord Plunket was present, and took part in the judgment, the opinion of Lord Coke was cited. That was a clear, distinct, and decided opinion. It was overruled by the House, and Lord Plunket, in giving his judgment, said, ‘If Lord Coke had stated no reasons in support of his decision, I should, out of deference to him, have doubted the correctness of my own opinion; but as he has stated reasons, and those reasons have no validity, I feel compelled to decide against him.’ Again, the Devon case on one side rested entirely upon the distinct and clear opinion of Lord Coke. It was argued in this House most learnedly and most elaborately, and the House, after much consideration and care, came to a conclusion contrary to that of Lord Coke, which was declared not to be founded in law. I state this case not to lessen the reputation of that learned person, but to show that we must not be put down by the *ipse dixit*, unfortified by any authority, of even so distinguished a lawyer as my Lord Coke.”

It may be remarked that Lord Lyndhurst expresses himself in a very guarded manner with regard to the legality of creations of peers for life, and it would appear that he had formed no decided opinion in favour of the illegality of such prerogative.

With reference to the note by Hargrave and the authority of Shaftesbury, relied on by Lord Lyndhurst, Earl Granville said:¹ “My noble and learned friend quoted Mr. Hargrave as an

¹ Hansard, vol. cxi. p. 289.

authority, upsetting the doctrine of Lord Coke. My answer to my noble and learned friend is, that Mr. Hargrave never did any such thing. If he will refer to the note in which that statement is supposed to be made, my noble and learned friend will observe that it is marked with a letter, and not with a number, and he will also see that it occurs in an edition published long after the death of Mr. Hargrave, and I am not sure whether it was not after the death of Mr. Butler. In an anonymous advertisement to the work, it was stated that all the additional notes were by Mr. Butler. That part of the work was not undertaken by Mr. Butler. Mr. Hargrave and Mr. Butler divided the work, and this note was in Mr. Hargrave's part of the work. I do not find fault with my noble and learned friend for having made much of this, or for having referred to Lord Shaftesbury as an authority upon the subject; but I believe Lord Shaftesbury was famed for being clear-headed, but not for his knowledge of the law. I may here quote a passage from a very good book, to which reference is being made every day. I find in Mr. Macaulay's 'History of England' this passage:—'Even Shaftesbury, vigorous as his intellect was, painfully felt his want of technical knowledge.' My noble and learned friend will see, that although the note refers to precedents said to have been previously cited, yet that there were no precedents above mentioned by him, and there is no sort of proof that this note was ever seen by Mr. Hargrave. It is altogether a posthumous note, and in all probability had never been seen either by Mr. Hargrave or Mr. Butler. If such notes as this are to be accepted, then the authority of Coke is gone for ever."

Lord St. Leonards said:¹ "I do emphatically assert, and I believe in my conscience, and not without a careful consideration of the subject, that the issuing of a patent of peerage for life is illegal, as far as it attempts to confer a right to sit and vote in this House, and I hope to be able to make good that assertion." His Lordship, after reviewing the observations of Lord Coke, says:² "I contend, however, that Coke, in the opinion which he gave, was alluding to the mere grant of an honour,

¹ Hansard, vol. cxi. p. 297.

² Ibid. p. 299.

and not to the conferring of any right to sit and vote in this House." Lord St. Leonards also contended that Lord Coke was not to be relied on with respect to the law of dignities, and brought forward instances in support of this view.

The Lord Chancellor "contended that the legality of life peerages was perfectly clear."¹

Lord Campbell said :² "I confess that, without attending to arguments on either side, I was under an impression that peerages for life were legal ; but the more I investigate and deliberate, I see greater reason to doubt this opinion ; and if I were forced at this moment to pronounce one way or the other, I should say that the legality cannot be established." It is worthy of remark that on June 27, 1851, Lord Redesdale said he should propose on a future occasion that the Law, in the same way as the Church, should to a certain extent be represented in the House of Peers by the holders of certain offices ; that they should be admitted to the House of Lords as Peers of Parliament during the continuance of holding such offices. Lord Campbell on that occasion said that "he did not intend to offer any opinion on this suggestion. It might deserve the consideration of their Lordships. His noble friend proposed that those high officers should have a temporary peerage, to be held only during their term of office. Now, this could not be done by an address to the Crown. The Crown might create, by its prerogative, a peerage for life, but not a peerage during a man's continuance in office ; that would require an enactment of the three branches of the Legislature."³ In his "*Lives of the Chief Justices*," Lord Campbell had also expressed himself in favour of the legality of the creation of peers for life. In a subsequent part of his speech, already referred to, Lord Campbell said that,⁴ "with regard to Peerage Law, Coke never has been considered a high authority, and, as was observed by Lord Plunket in the Waterford case, 'the strange reasons which he sometimes gives show the unsoundness of his opinions.'" Lord Campbell, after adverting to the opinion of Lord Coke with

¹ Hansard, vol. cxi. p. 322.

² *Ibid.* p. 333.

³ Earl Granville's Speech, Hansard, vol. cxi. p. 288.

⁴ Hansard, vol. cxi. p. 345.

reference to peerages for life, said :¹ " But this would sanction peerages *pur autre vie* (or for the life of another), which I have not yet heard defended ; it would sanction peerages for a term of years, adding the words, ' if the grantee so long live ; ' it would sanction peerages at will, such as was granted to the Earl of March in the reign of Edward IV. ; it would sanction peerages for a single night ; for none of these could ever go to executors or administrators. My lords, this last class of peerages would be exceedingly convenient on a critical division, when the pairing off is not satisfactory, and the book of proxies looks alarming, for the minister would only have to march into the House before five o'clock the requisite number of peers for a night to secure his majority, and his object would be accomplished without any permanent addition to the peerage."

Lord Brougham closes the formidable phalanx of talent arrayed against the authority of Lord Coke. " For the authority of that great lawyer," observed Lord Brougham,² " I entertain, in common with all my noble and learned friends, the most profound respect, when he gives you his opinion upon any of those chapters of the law with which he was familiar, and which he had well studied. Upon the Law of Parliament his authority is of very much less weight—upon that *lex et consuetudo Parliamenti*, which he has himself described as *ab omnibus quærenda, a multis ignorata, a parvis cognita*, it cannot be admitted that he has proved his belonging to the latter class." After examining the reasons on which the dictum of Lord Coke is founded, Lord Brougham said,³ " They who rest their contention on that great lawyer's authority can have no answer to the pretension which may be set up for a further stretch of the prerogative, and must admit that the creation of a peer to sit in this House during the pleasure of the Crown is valid. Indeed, a man by this reasoning of Lord Coke, might be sent here to take his seat, and vote in one debate, because, were he to die on the morrow, nothing could pass to his personal representatives." Further on his lordship says :⁴ " If, however, we go to the other instances of this great man's known and manifest errors upon

¹ Hansard, vol. cxl. p. 345.

² Ibid. p. 1203.

³ Ibid. p. 1202.

⁴ Ibid. p. 1203.

matters connected with the Law of Parliament, we shall find the most reasons for rating his authority much lower upon such questions than upon any of the ordinary ones of which he treats; I may even go so far as to say lower than that of any other celebrated lawyer, for none have fallen into more remarkable errors." After detailing several errors of Lord Coke's with reference to matters of constitutional law, Lord Brougham said:—"No one can doubt that his opinion would have been against the prerogative, had he examined its history, and found no precedent whatever for its exercise. This must needs have been the conclusion of one who so habitually argued from precedents, and only went wrong when he decided without examination of the facts, or, from haste or inadvertence, mistook or mis-stated them."

Earl Granville² and Mr. Roundell Palmer (*Times*, 8th July) have fallen into error in attributing to Lord Brougham an expression of opinion on this subject in the Devon case. His lordship, in fact (Report, p. 167), cited the opinion of Judge Dodderidge, as follows:—"It is there (Work on Honours) laid down that the Crown may grant a barony for life, or even *per autre vie*."

It may be here observed, that the opinion of Lord Coke has been followed by several eminent text-writers: by Selden, in his "Titles of Honour;" by Comyn, in his "Digest;" by Cruise, in his treatise on "Dignities," and by Blackstone, in his "Commentaries." It has been contended that these great writers would not have implicitly followed in the footsteps of Lord Coke, had they not been convinced that he was correct. The absence of any remark by the various commentators of Blackstone is also relied on. But still it is not a little remarkable, that none of these writers should have made any original remark of their own on the subject. It shows, indeed, as if these opinions "might," as Lord St. Leonards observed,³ "all be traced to the parent stock," and that "every one of them was dependent upon Lord Coke's authority." Lord Campbell

¹ Hansard, vol. cxi. p. 1205.

² Earl Granville's Speech, *ibid.* p. 288.

³ For the extracts from, and allusions to the debates not specially referred to, see Hansard, vol. cxi. p. 263, *et seq.*; and *ibid.* p. 1121, *et seq.*

remarked, that as the opinion of Lord Coke "had not been acted upon, as far as sitting in Parliament is concerned, for 150 years before Lord Coke's time, and has not been acted upon for 250 years since his time, the opinion gains little additional authority by any repetition." His lordship however observed, that "it certainly had created a pretty general impression that a peerage for life, with all the privileges of the peerage, might lawfully be created." Lord Brougham expressed himself much stronger, and said, "All the writers who have followed have been ruled by that dictum of his" (Lord Coke's) "alone, and have blindly followed one another, without the least inquiry either into the soundness of his opinion, or the grounds on which it rests." And, again, Lord Brougham remarked, that "text-writers, following one another, have been led into a manifest error by Lord Coke."

The Lord Chancellor also exhumed an opinion attributed by him to Mr. Justice Dodderidge, but by Lord Campbell said to be contained in a book, entitled the "Magazine of Honour," collected by Master Bird. Revised and enlarged by Sir John Dodderidge, Judge of the King's Bench. This book contains the following passage, treating of barons by patent:—"This kind of dignity of baron shall be of such countenance in descent, or *otherwise*, as shall be limited in the habendum in such letters patent contained; for it may be *but for the life of him to whom it is given, or for term d'autre vie—of some other man's life*, as some hold opinion in 9 Hen. VI. 29; for *cujus est dare, ejus est disponere*." Lord Campbell, however, contended that the reasoning contained in this passage "is wholly untenable."

The Lord Chancellor also brought to bear on this subject the authority of Sir Matthew Hale in rather a singular manner. "Probably," observed the Lord Chancellor, "the next highest authority to Lord Coke was Sir Matthew Hale; and there existed in the Library of Lincoln's Inn a manuscript copy of Coke, which had been in the possession of Sir Matthew Hale. He could not say that Sir M. Hale declared that Lord Coke was right, but there was this negative testimony to be gathered from the document; that whereas it was covered with comments upon all that Lord Coke said upon the subject, his

opinion with regard to life peerages was not doubted or questioned for a moment." This observation of the Lord Chancellor's may be worthy of consideration by those great men who are in the practice of covering their books with manuscript notes.

The Lord Chancellor also relied on an opinion expressed by Lord Redesdale, in his third report "On the Dignity of a Peer," which is dated in 1822. Lord Redesdale there said, "That the committee over which he had presided found that persons to whom the dignity had been granted by the Crown had usually had set forth in the patent rights of inheritance, general or special, either by express term of grant, or by consequence of the law, though, in some instances, the effect of such grants had been specially restricted to the lives of the persons to whom such grants had been made."

We have now, at some length, considered the legal view of the present question. Amid such conflicting opinions, it is difficult to arrive at any satisfactory conclusion. "When doctors disagree, who shall decide?" If, however, we might venture to express any opinion on the subject, it would be, that the Crown possesses, strictly speaking, the *legal* right to create peers for life.

We now arrive at the more important part of our subject; that is, whether the prerogative in question is constitutional. In order to determine this point, it is necessary, in the first place, to consider the history and nature of the early peerages.

"The original peers of Parliament," observes Mr. Lewis,¹ "were those by *tenure*. Our peerage is, in fact, of *feudal* or territorial origin; and Mr. Hallam remarks,² 'The consideration of baronial tenures will best develop the formation of our Parliamentary system.' Every tenant *in capite* of lands was *ipso facto*, at the outset of the feudal system, a Parliamentary baron, and entitled to be summoned by the King's writ; but in the time of King Henry III., some law or maxim was introduced, the traces of which have been now lost, to exclude or to exempt all but the *barones majores*, or those holding *per*

¹ Juridical Papers, vol. i. pp. 149, 150.

² Mid. Ages, vol. ii. p. 140.

baroniam, from coming to Parliament under the King's writ. Upon this point, there is a provision in King John's Magna Charta, in which a difference is shown to have even then existed with regard to the *barones majores*. The enactment is, that whenever an aid or scutage shall be required, 'Faciemus summoneri archiepiscopos, episcopos, abbates, comites, et majores barones regni, sigillatim, per literas nostras. Et præterea faciemus summoneri in generali, per vice-comites et ballivos nostros, omnes alios qui in capite tenent de nobis.'

"There was thus a distinction in the mode of summoning greater and lesser barons. The lesser barons gradually ceased to sit in Parliament; and it seems probable that eventually they, or those whom they elected to represent them, began to sit with the citizens and burgesses in a separate house.

"The baronies by tenure were, in the course of time, held in law to give a right to the *heir* and *successor* in the barony to claim the place in Parliament belonging to the ancient dignity; and several instances are to be found in the reigns of Henry V. and Henry VI. of claims of right of this sort being put forth and allowed after due investigation. There is also a patent of Henry VI. in the case of the barony of Lisle, which distinctly recognizes the right of all barons by tenure to places in Parliament. It recites that one Warinus Lord Lisle was seised of the manor of Kingston Lisle, and that he and all his predecessors, on account of the said manor, had enjoyed the dignity of Baron and Lord Lisle from time immemorial, and *had place in all Parliaments as other barons of the realm of England*.

"There is a striking passage in the statute of Charles II. abolishing military tenures, which shows the parliamentary position of territorial peers. The statute 12 Car. 2, c. 24, s. 11, is in these words:—'Nothing in this Act contained shall infringe or limit any title of honour, feudal or otherwise, by which any person hath or may have a right to sit in the Lords' House of Parliament, as to his or their title of honour or sitting in Parliament, and the privilege belonging to them as peers.'

So much for peerages by *tenure*.

"Peerages by *writ*," again to use the words of Mr. Lewis,¹

¹ Juridical Papers, vol. i. p. 150.

"arose in the reign of Henry III., if not earlier.¹ In consequence of the barons' wars which took place during that reign, a great number of the ancient nobility was destroyed; and therefore, when a Parliament was called by Henry III. at Winchester, and afterwards at Westminster, he, to increase the order of Peers, issued his *writs* to several persons who did *not* hold their lands *per baroniam*. The writ was a summons to attend the House of Peers by the style and title of that barony which the King was pleased to confer. It was issued to persons not possessed of baronies, by virtue of which they were seated among the peers, and acquired the rank and title of barons."²

Peerages by *patent* also arose at a very early period.

"From the time of Henry the Third," says Sir Harris Nicholas,³ "to the eleventh of Richard the Second, 1387, Barons were created by Writs of Summons, and Earls and Dukes by Patents or Charters. A Writ of Summons, and a Sitting in Parliament in consequence of such writ, are held to create an hereditary peerage to the heirs of the body, male and female, of the person so summoned. Though there are grounds for believing that it was the general practice to summon the heirs of the individuals so created by writs, it is beyond a doubt that, until the reign of Richard the Second, the Crown was accustomed to summon a person to one, two, or more Parliaments, or *during his life only*. Few baronies by writ have been created for some centuries, though many ancient dignities of that nature have been allowed to one among several co-heirs. This is an exercise of the Prerogative which requires the utmost caution, since an ancient Peerage is thereby revived, which descends to the heirs, *male and female*, of the body of the individual so restored, whilst a *new* creation by patent would become extinct when the heirs *male* fail. In cases, however, where a person is the *sole* heir of a Barony by Writ, he has a legal right to the title."

Mr. Hallam gives an interesting account of the nature and history of early peerages in the following terms:⁴—"The number

¹ Cruise, Dig. s. 48.

² Letter, p. 15, 2nd ed.

³ Bowyer, Const. Law, p. 459.

⁴ Const. Hist. vol. iii. pp. 46, 47, 48, 3rd ed.

of temporal lords summoned by writ to the Parliaments of the House of Plantagenet was exceedingly various; nor was anything more common in the fourteenth century than to omit those who had previously sat in person, and still more their descendants. They were rather less numerous, for this reason, under the line of Lancaster, when the practice of summoning those who were not hereditary peers did not so much prevail as in the preceding reigns. Fifty-three names, however, appear in the Parliament of 1454, the last held before the commencement of the great contest between York and Lancaster. In this troublous period of above thirty years, if the whole reign of Edward IV. is to be included, the chiefs of many powerful families lost their lives in the field or on the scaffold, and their honours perished with them by attainder. New families, adherents of the victorious party, rose in their place; and sometimes an attainder was reversed by favour; so that the peers of Edward's reign were not much fewer than the number I have mentioned. Henry VII. summoned but twenty-nine to his first Parliament, including some whose attainder had never been judicially reversed; a plain act of violence, like his previous usurpation of the crown. In his subsequent Parliament the peerage was increased by fresh creations, but never much exceeded forty. The greatest number summoned by Henry VIII. was fifty-one, which continued to be nearly the average in the two next reigns, and was very little augmented by Elizabeth. James, in his thoughtless profusion of favour, made so many new creations, that eighty-two peers sat in his first Parliament, and ninety-six in his latest. From a similar facility in granting so cheap a reward of service, and in some measure, perhaps, from the policy of counteracting a spirit of opposition to the Court, which many of the lords had begun to manifest, Charles called no less than one hundred and seventeen peers to the Parliament of 1628, and one hundred and nineteen to that of November, 1640. Many of these honours were sold by both the princes; a disgraceful and dangerous practice, unheard of in earlier times, by which the princely peerage of England might have been gradually levelled with the herd of foreign nobility. This has occasionally, though rarely, been suspected

since the Restoration. In the Parliament of 1661 we find one hundred and thirty-nine lords summoned."

Sir Harris Nicholas holds that the peerage may be granted for life. Mr. Bowyer says,—“It is not clear that the Crown may not create peers for life;” and adds, “if the question were ever brought before the House of Lords, their Lordships would probably be anxious, on grounds of public policy, not to sanction the doctrine that peers may be created for life.”¹

It is deserving of remark here, that Mr. Macqueen, in a pamphlet written before the elevation of Baron Parke to the peerage, maintains the right of the Crown to create peers for life. “Life peerages,” observes Mr. Macqueen,² “would not be an innovation. The Lords have just reported their opinion to the Crown, that the original Dukedom of Montrose, created in 1488, was but for the life of the grantee. It is not questioned that life peerages were known in Scotland: it is certain that they existed in England. The lesser barons summoned after Magna Charta were often for life. The reign of Henry III. is no doubt obscure. Then it was that the change took place, solving a mystery in the Rolls of Parliament that puzzled and baffled the committee appointed to inquire into and report on the dignity of the peerage. In the reigns of Edward I., II., and III., of Richard II. and of Henry IV., *Baronetages* were given to the sons of Peers, to judicial dignitaries, and to military and naval commanders. Bannerettes were temporary members of the Upper House. They might, however, be hereditary, and those came in time to be considered as Barons. But they seem to have been more usually for life, or for a single Parliament, or *durante officio*. None of these could be members of the Lower House, or serve on Juries of Commoners. Bannerettes were not, originally, military dignities; they were conferred on grave chief justices. Bannerettes were the last in the first order of the State. A Hull merchant, who had lent the King a sum of money for his foreign wars, was made a *Bannerette* by Edward III.”

We shall now direct the attention of our readers in detail to

¹ Juridical Papers, vol. i. p. 156.

² Letter to Lord Lyndhurst, p. 23.

the precedents of the early creations of life-peerages, as stated and arranged in the speech of Lord St. Leonards,¹ which, as corrected by himself, contains the best account of them.

The first case is that of Guiscard D'Angoulesme. He and his father were both severely wounded at the battle of Poitiers; he was left on the field for dead, but recovered, and passed into the service of England; he was much employed by Edward the Third, and by the Black Prince; and when Richard the Second was crowned in his boyhood, Guiscard was appointed his tutor, and was created Earl of Huntingdon for his whole life. He was summoned to Parliament; but as a foreigner he could not sit: it does not appear that he did sit. He died at the end of three years, without issue.

In the 1st of Richard the Second there is another instance of a grant of an earldom without the authority of Parliament. Thomas, Earl of Wodstoke, was created Earl of Bucks. However, in the 14th of Richard the Second, for the security of the earl, a new grant was made of the same earldom, with the assent of the Prelates, and Peers, and Commons.

The next case is that of the favourite Robert de Vere, Earl of Oxford, who was created Marquis of Dublin (being the first creation to that dignity) for his whole life. He was afterwards made Duke of Ireland. It may be observed that the marquis was already an earl, with a descendible estate; so that he and his issue male would continue to sit, just as if the marquissate had never been created.

The next instance is that of the creation, by Richard the Second, of John, Duke of Lancaster (the King's uncle), Duke of Aquitaine for his whole life.

The last on the list in the reign of Richard the Second is the grant to his cousin, the Countess of Norfolk, of the rank of duchess for her whole life. This lady was already a countess.

For the authorities we now pass on to Henry the Fifth. In his second year the King created John of Lancaster, his brother, Earl of Kendal and Duke of Bedford, to hold during his natural life; and at the same time he created his other brother, Humphrey, Earl of Pembroke and Duke of Gloucester for life; and

¹ Hansard, vol. cxi. pp. 304, 305, 306, 307, 308, 309.

Richard of York Earl of Cambridge ; the latter, it appears without any limitation.

The next creation is that by Henry the Fifth, of Thomas, Earl of Dorset (the King's brother) ; he was created, it is stated, Duke of Exeter "for his natural life." Stow makes no mention of its being confined for life, but it is so expressly stated by Dugdale; from which it has been inferred that he considered it was, in law, confined to the duke's life. Now, in point of fact, the grant was general, and there were no words confining it to the duke's life. Dugdale, in mere error, states it to have been a creation for his natural life. He does not come to that conclusion from the want of words of limitation ; he makes no such statement. It will be observed that he was already an earl.

The last creation in the reign of Henry the Fifth is that in 1417, of the Earl of Warwick, who was created Earl of Albemarle for life. He was already an earl, and his earldom was descendible to his issue male.

The next case bearing upon this point is in the time of Henry the Sixth. In 1411 Sir John Cornewall, who had married the King's aunt, was created Baron Farnhope ; and in 1444 (20 Hen. 6) he was created Baron Melbroke. Both these grants were without words of limitation.

The last case is that of the Earldom of Thomond, created by Henry the Eighth in 1543. Upon the surrender to the King of the principality of Maurice O'Brien, the Earldom of Thomond was granted to Maurice for life, with remainder to his nephew Conan (whom, in truth, he had deposed) for life ; but each of them was at the same time created a baron in the usual way to him and his heirs male ; so that each sat in respect of a descendible estate, although a higher title was limited to each in succession for life.

We have stated the instances of creations of peers for life so far as the facts seem to be admitted on all sides, in order to enable our readers to form their own opinion on the subject. Many objections, however, have been started with regard to the validity of these precedents. The creations, it is alleged, were made to a foreigner, or were confirmed by Parliament, or the possessors had already old dignities, or there were no apt words

limiting the peerage, so that it is doubtful whether the patents were not void, or at least whether an hereditary peerage was not intended. The turbulent period when many of these peerages were created, the scenes of violence which then ensued, the violation of all law and order which then prevailed, are also much relied on. The great and leading objection to these precedents, however, is that of *desuetude*. Three or four hundred years have now elapsed since these creations took place, and even then they were not common or frequent. If precedents so old, exhumed from periods so ancient, are to be recognized as of any validity, where must the limit be fixed? In those days, it is said, the husband of a peeress in her own right was entitled to the peerage during their joint lives. A man might be tenant by the curtesy of his wife's dignity. Again, a peer might alienate his peerage with the consent of the Crown, and could surrender it to the Crown. "Upon a descent to females, it was formerly considered that the eldest was entitled, and that the Crown could confer the right on the husband, if any. It is now settled that the dignity is in abeyance. The power to determine the abeyance is in the Crown, but it can only be exercised in favour of one of the co-heirs. Formerly it was held that the King might degrade a peer for poverty; but it has long been settled that this can only be done by Parliament. Coke lays it down expressly, that if a duchess marries a baron, she remains a duchess, and loses not her name, because her husband is noble; yet other authorities were opposed to this view; and upon the coronation of George III., the Duchess Dowager of Leeds, who had married Lord Poltimore, was not allowed to rank as a duchess."

"The doctrine of *desuetude*," observes Lord Campbell, "has unquestionably been acted upon in England with respect to the other branch of the Legislature. Formerly no one could be returned as a member of the House of Commons who was not an inhabitant of the place he represented. There has been no written law to alter this usage, yet now any British subject may be returned by any constituency within the United Kingdom; so, by usage, the rights of voting in different boroughs, formerly nearly uniform, became infinitely diversified. Not only in the

Plantagenet reigns, but in the time of the Tudors, the Sovereign was in the habit of creating new constituencies, and adding at pleasure to the members of the House of Commons. Nay, more; when he had once enfranchised a borough, with power to send representatives to Parliament, at his pleasure he ceased to issue a writ to that borough, on summoning a new Parliament, and so, by his prerogative, the borough was disfranchised." A remarkable instance of prerogative exercised in former times is contained in a note to Lord Campbell's published speech:—"In the reign of Henry VIII., that sovereign, in a writ to the sheriff for the election of a new member of the House of Commons, says, 'We think, for the discretion and experience which we know to be in our well-beloved servant Anthony Deny, of our private chamber, that he is a man meet and fit to be chosen. We will, therefore, and require you, that, proceeding to the election of a new burgess of our said Parliament, ye elect and choose our said servant Anthony Deny, and so to admit him to the same, with the wages and fees thereunto belonging and appertaining.'"

"After," said Lord Brougham, "the great Charter had been once and again confirmed, and when the government might be supposed to have settled into somewhat of a more regular form, we find no less a sovereign and lawgiver than Edward I., our English Justinian, as he has been so generally termed, sending a commissioner by his own mere authority, one John de Kirby, round to all the cities and towns of the realm, to explain to the people the royal wishes. What he was sent for appears next year, when more money was wanted; for a Parliament was then holden at Shrewsbury, and grants obtained, and all the monies which Kirby had collected were deducted from the levies now legally imposed." "Observe," again remarks Lord Brougham, "how little the Crown regarded the rights, the uncontested rights, of Parliament itself. We have all heard of the Lack-learning Parliament,—the *Parliamentum indoctum*, as it was more learnedly called, just as we may have heard of a *Parliamentum supradoctum*, or *perdoctum*, in later times, from the great *copia peritorum* which it has exhibited. That of Henry IV., in 1404, was summoned by writ, which the King issued without

any authority whatever, commanding that no man of the law should be chosen knight of the shire. This illegal command was obeyed, and the consequence was, that no lawyer sat, the boroughs having apparently taken the hint from the counties; and Lord Coke, as we all know, observes on this Parliament; that 'never a good law was made thereat.' But though no one can show any statute depriving the Crown of the right thus to control elections, yet no one will now maintain that such a prerogative is vested in it, or ever was, by law." Again: "It was," remarked Lord Brougham, "the constant practice of the prerogative actually to alter the statutes passed during the session, by directions of the Sovereign, by orders in Council, and without either the previous authority of the two Houses themselves, or their subsequent confirmation of the changes made. The alterations were usually by the Privy Council, at the time of proclaiming the Act."

These are certainly strong arguments. It may be remarked, however, that with reference to the various acts of prerogative to which we have just alluded, they have either been held not to exist any longer, or to have never existed, or they have fallen into disuse, and become virtually extinguished through some opposite usage or practice inconsistent therewith. There has been a kind of adverse possession, if we may venture to use the expression. Now, with reference to the right of the Crown to make peers for life, the same argument does not hold, or, at least, to the same extent. By the exercise of this prerogative, no usage or custom already existing is directly affected, neither the rights of peer or commoner are interfered with, except, at least, in quite an incidental manner.

The cases where there has been a creation for life, with remainder over, have been relied on on one side as supporting the alleged prerogative; but it is contended that these creations are in their nature hereditary.

The Scotch and Irish peers, and the bishops, are also made to fill up their part in the present discussion. It is said, however, that the peers for Scotland and Ireland sit by virtue of special provisions made on the union of the respective countries, and that with reference to the bishops, they formerly sat in right of

certain baronies annexed to their benefices, and that they now sit in the House of Peers as a separate branch of the Legislature *virtute officii*.

The circumstance that peerages for life have frequently, and more recently, been conferred on ladies has been also relied on by the supporters of the prerogative. It is contended, however, that as ladies cannot sit and vote in the House of Lords, a mere dignity was necessarily only conferred.

An argument against the prerogative has been drawn from the circumstance that, in the works of lawyers and constitutional writers, the House of Lords is always referred to as hereditary in its nature and character. Montesquieu says :—"The body of the nobility ought to be hereditary. In the first place, it is so in its own nature; and, in the next, there must be a considerable interest to preserve its privileges; privileges that in themselves are obnoxious to popular envy, and, of course, in a free state, are always in danger." Blackstone speaks of the peers as the *hereditary* counsellors of the Crown. Paley and Burke use the same term. It is worthy of remark, however, that these writers only referred to the Constitution as they saw it existing in their own day, and that their attention was not directed to the consequences of the exercise by the Crown of the prerogative of creating peers for life only.

It is necessary to direct attention to one other leading argument in the consideration of the present question; and that is, that no precedents are of any value which do not occur since the Revolution of 1688, when the Constitution acquired its present settled form. It is undoubtedly important in determining questions relating to the prerogative, to ascertain the effect of the settlement at the Revolution. Mr. Hallam says :—"Except in the article of the dispensing prerogative, we cannot say, on comparing the Bill of Rights with what is proved to be the law by statutes, or generally esteemed to be such on the authority of our best writers, that it [the Revolution] took away any legal power of the Crown, or enlarged the limits of popular and parliamentary privilege." "The change seemed small," observes another writer; "not a flower of the Crown

¹ Constitutional History, vol. iii. p. 143, ed. 3.

was touched, not a single new right was given to the people. The whole of the English law, in the opinion of the highest authorities—Holt, Maynard, and Somers—remained exactly the same after the Revolution as before it.” “The great Charter,” observes Paley,¹ “and the Bill of Rights were wise and strenuous efforts to obtain security against certain abuses of regal power, by which the subject had been formerly aggrieved; but these were either of them much too partial modifications of the Constitution to give it a new original.” And when we consider the numerous important questions which have been set at rest since the Revolution; when we remember that since that time general warrants have been declared illegal; that the law of libel has been placed on a more satisfactory footing; that the freedom of elections has been secured; that the judges have been made more independent of the Crown; that the *Habeas Corpus* Act has been extended; and that the liberty of the press has been established; the argument above adverted to loses a good deal of its force.

Paley has finely compared the British Constitution to “one of those old mansions which, instead of being built all at once, after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs suited to the taste, fortune, and conveniency of its successive proprietors.”² Is it even now too late to add, if necessary, a wing or a pillar to this glorious building?

On the whole, however, it must be considered, we presume, extremely doubtful whether the prerogative under consideration be in conformity with the principles of the Constitution as at present established.

We have left ourselves little room to speak of the expediency of the exercise of the prerogative of creating peers for life. It should be remarked, in the first place, that if an act of the prerogative be inexpedient or unwise, it does not follow as a consequence that it is also unconstitutional. “Some writers

¹ Paley's *Philosophy*, Works, p. 640, ed. 1849.

² *Ibid.* p. 640.

upon the subject," says Paley, "absurdly confound what is constitutional with what is expedient; pronouncing forthwith a measure to be unconstitutional, which they adjudge in any respect to be detrimental or dangerous."¹

It is contended on one side, that such an exercise of the prerogative is a direct attack on the hereditary character of the Upper House, calculated, in effect, to destroy its independence, and make the House of Lords in time elective, and entirely dependent on the ministry for the time being. The resort which may be had to this prerogative for the purpose of *swamping* the House of Peers has been much insisted on; and the instance of the twelve peers in the reign of Queen Anne, and the ever-memorable threat held over the House of Lords at the time of the Reform Bill, are relied on as convincing proofs of the dangers which would be attendant on the exercise of the present prerogative. We are also directed to take warning from the occurrences in France. On the other side it is replied, that an occasional exercise of the prerogative now claimed would be wise and beneficial; that it would enable the Crown to form a strong appellate Court, by the elevation to the House of Lords as peers for life of eminent lawyers, whose fortunes would not admit of their accepting hereditary dignities; and that men of eminence generally, whether in literature, science, or the fine arts, might also be occasionally raised to the peerage. Such acts of prerogative, it is contended, would operate beneficially, and while conferring honour on the individuals selected, would also tend to raise the House of Peers in the estimation of the country. With reference, too, to the dangers attending the exercise of the prerogative by ministers reckless or unscrupulous, it is replied that, in this free country, there exists above and beyond the Crown a prerogative of public opinion sufficient to check and control any undue or improper exercise of the present prerogative. "It may be observed," says Sir Robert Walpole,² "that the King, for his own sake, will rarely make a great number of peers, for they, being usually created by the influence of the First Minister, soon become, upon a change of adminis-

¹ Paley's *Philosophy*, Works, p. 640, ed. 1849.

² Speech on the Peerage Bill, 1719.

tration, a weight against the Crown." "In the British," observes Paley,¹ "and possibly in all other constitutions, there exists a wide difference between the actual state of the government and the theory. When we contemplate the *theory* of the British Government, we see the King invested with the most absolute personal impunity; with a power of rejecting laws which have been resolved upon by both Houses of Parliament. What is this, a foreigner might ask, but a more circuitous despotism? Yet, when we turn our attention from the legal extent to the actual exercise of royal authority in England, we see these formidable prerogatives dwindled into mere ceremonies."

There may, indeed, be dangers in admitting the right of the Crown to create peers for life; but on a careful review of the arguments on the present question, we cannot help arriving at the conclusion that those who have urged the many and great dangers attending the exercise of this prerogative, have in some manner overlooked the genius and spirit of our Constitution. Still, from the very decided opinion expressed on this subject in the House of Lords, the question is not likely to be soon again raised, although it will still remain a moot point for the consideration of lawyers and constitutional writers.

However, the measure now thrown out, for making better provision for the discharge of the appellate jurisdiction of the House of Lords, to which we have already adverted, contained a legislative admission of the expediency of creating a limited number of life-peers for the special object in view. The Bill proposed to enact² that it should be lawful for her Majesty to appoint two persons as Deputy Speakers of the House of Lords, to assist in the judicial business of the House, and to hold their offices during good behaviour; and that no person³ not having succeeded to an hereditary peerage should be qualified to be appointed Deputy Speaker under the Act, unless her Majesty should have previously granted to him a peerage for the term of his life, or for some greater estate, nor unless he should have held any one of the judicial offices mentioned in the Act. The

¹ Paley's Philosophy, Works, p. 640, ed. 1849.

² Sec. 1.

³ Sec. 2.

Bill proposed to provide for the appointment of the judicial peers as follows :¹—

“If her Majesty by her letters patent shall have granted, or shall hereafter grant, a peerage for life only to any person who shall be appointed Lord High Chancellor of Great Britain, or Deputy Speaker under this Act, such person, on receiving the appointment of Lord High Chancellor of Great Britain, or of Deputy Speaker under this Act, shall be entitled to receive a writ of summons as a Peer of Parliament, and on receiving the same to sit and vote in the House of Lords, and to have and enjoy all the rights and privileges of a Peer of Parliament during his life, if there are not more than three other persons having seats in the House of Lords as peers for life only at the time he shall be so created: provided always, that not more than four persons shall have seats in the House of Lords at one time as peers for life only: provided also, that if any person to whom a peerage for life only shall have been granted shall inherit or receive a patent for an hereditary peerage, he shall not be reckoned as one of the peers having a seat in the House of Lords for his life only.”

This Bill was founded on the Report of the Select Committee of the House of Lords appointed to inquire into the state of the appellate jurisdiction. The Committee state that, in their opinion, it is desirable that two offices should be created, to be held by two law lords, whose duty it should be to assist the House in the performance of its judicial duties; and they accordingly recommend that her Majesty should be empowered to appoint two lords to be Deputy Speakers of the House of Lords, with salaries attached to their offices.

With reference to the question of life peerages, the Committee state as follows :—“The attention of the Committee has been drawn to the difficulty which may, in some cases, be felt hereafter, of appointing the most fit persons to juridical offices connected with the House of Lords, if it cannot be done without conferring on them hereditary peerages; and it appears to the Committee advisable, that any person appointed to such an office should be enabled, by authority of Parliament,

¹ Section 4.

to sit and vote in the House, and enjoy all the rights and privileges of a Peer of Parliament, under a patent conferring a peerage for life only, if the Crown may have granted, or shall grant, the same to such person, in preference to an hereditary peerage: provided always, that not more than four persons shall have seats in the House at one time as peers for life. The Committee recommend that in all respects, excepting those where change has been recommended in this Report, the functions of the Lord Chancellor, and the rights and privileges of the whole body of the peers, shall remain unaffected."

The above measure had been introduced in order to satisfy, on the one hand, the very general desire, on the part of the profession and of the public, for some improvement in the appellate jurisdiction of the House of Lords, and on the other hand, to escape the difficulty of permitting the Crown to exercise the right of creating peers for life by the aid of the prerogative alone.

We have not space to enter upon the merits of this scheme; but whatever those merits may be, without doubt the plan involves an organic change in the constitution of the House of Lords as a Court of Appeal.

With reference to the general question, doubts had been entertained whether the effect of the above Bill would not be to take away any existing right in the Crown to create peers for life. The better opinion, however, we believe, was, that the royal prerogative would have remained unaffected by the proposed measure.

ART. VI.—THE ENCUMBERED ESTATES ACT.

REMARKS ON THE CASE OF ERRINGTON V. RORKE.

THE case of Errington and Rorke, recently decided in the Court of Queen's Bench in Ireland, has attracted a great deal of public and legal attention. It is commonly supposed that it has shaken the titles of purchasers of estates sold under the Encumbered Estates Act. As this decision, in the propriety of which we fully concur, falls far short of this serious effect, and, we hope, can only affect a very small amount of property sold by the Encumbered Estates Commission, we shall briefly state the facts on which it is based, and the reasoning by which it is sustained.

It appears that, in 1853, the fee-simple estate of a Mr. Hamilton, situate in the county of Kildare, was brought within the sphere of the Encumbered Estates Commission for sale and transfer. It was divided into several lots for sale; among which it is necessary to notice three only, which we shall designate as lots 1, 2, 3. Lot 3 consisted of about 800 acres. The estate of Mr. Hamilton, in about 25 acres of this lot, was a reversion in fee, expectant upon a freehold interest for three lives, which was vested in a Mr. Rorke. Whether his estate in lots 1 and 2 was a reversion in fee, or the bare inheritance in fee-simple, did not appear, and was immaterial to the case in question. An absolute order for the sale of the entire estate, including lots 1, 2, 3, was made by the Commission; the customary notices, pursuant to the 23rd section of the Encumbered Estates Act, were served upon the tenants; Mr. Rorke brought in his lease in obedience to them; and by a printed rental *published by, and in accordance with, the usual order of the Commission*, his interest was declared binding upon the estate of Mr. Hamilton in his part of lot 3, and the sale, therefore, was expressed to be confined to the reversion in fee in this part of this lot. The sale took place shortly afterwards, pursuant to, and in conformity with, these conditions; and lot 1 was

purchased by a Mr. Bolton; lot 2 by a Mr. Errington; while lot 3 for a time remained without a purchaser. This being the state of things, Mr. Errington entered into an agreement to cede to Mr. Bolton a portion of lot 2, if he, Errington, could obtain an equivalent in lot 3, which as yet was unsold. This contract was carried out by the order of the Commission; Bolton obtained the usual conveyance of lot 1, including the stipulated part of lot 2; and Errington obtained a conveyance of the residue of lot 2, including the part of lot 3 comprised within Mr. Rorke's lease. This shifting of Mr. Errington's purchase from a part of lot 2 to the part of lot 3 bound by Mr. Rorke's lease, was done without notice to Rorke, and the conveyance to Mr. Errington of his part of lot 3 took no notice of the existence of Mr. Rorke's interest in this lot, although it had previously been declared by the printed rental published by the order of the Commission.

Mr. Errington, shortly after this transaction, laid claim to the possession of this part of lot 3, discharged of Mr. Rorke's interest. Upon being refused the possession, he brought his ejectment on the title against Mr. Rorke, and relied upon the conveyance of the Commission, which omitted in the schedule of tenancies annexed to it any mention of Mr. Rorke's interest. Mr. Rorke gave in evidence the printed rental under the order of the Commission, referring in terms to this interest as subsisting, and the instrument under which he held the lands in question. In this state of things, the Lord Chief Justice of Ireland directed the jury to find for the defendant, giving it as his opinion, that the jurisdiction of the Commission attached only upon the reversion in fee in this part of lot 3, and that the Commission had no power under the Act to merge the subsisting interest of Mr. Rorke. Exceptions were taken to this charge, and upon solemn argument, two judges of the Queen's Bench against one decided for the overruling of them, thereby affirming the opinion of the Lord Chief Justice. In his very able judgment, Mr. Justice Moore considered that Mr. Rorke had brought his interest within the operation of the 23rd section of the *Encumbered Estates Act*, which enacts, "that the sale" of land within the Act "shall be made subject to the tenancies,

leases, and underleases, ascertained as aforesaid ;" and that, once his interest had been ascertained by the printed rental under the order of the Commission, he had acquired a perfect title by that order ; but he threw out a strong opinion that, according to the true construction of the Act, the original power of the Commission extended only to the reversion in fee vested in Mr. Hamilton. The Lord Chief Justice fully coincided in this view, and analyzed the Act at length, to show that the subject-matter for the operation of the Commission could only be "an encumbered estate in land," and not an unencumbered interest. Mr. Justice Crampton differed in opinion, thinking that the Court, under the 27th and 49th sections of the Act, was coerced to assume the conveyance of the Commissioners to be infallible in every particular.

As this decision will probably be subjected to judicial criticism in the Exchequer Chamber of Ireland, and perhaps in the House of Lords, we abstain from any lengthened comments on it. We may observe, however, that the 27th section of the Act, on which Mr. Justice Crampton mainly relies, and which enacts, "that every such conveyance, executed as aforesaid by the Commissioners, upon the sale of land, shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed, subject to such tenancies, leases, and underleases as shall be expressed or referred to therein, as aforesaid ; but *save as aforesaid*, and as hereinafter provided, discharged from all former and other estates, rights, titles, charges, and encumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whomsoever,"—refers, by the terms "*save as aforesaid*," to the 23rd section, which enacts, "that the sale shall be made *subject* to the leases, tenancies, or underleases, *ascertained*" in the manner prescribed by that section ; and therefore, that as Mr. Rorke had his interest "*ascertained*" within the meaning of the 23rd section, it is expressly, and in terms, within the saving of the 27th section. As for the 49th section of the Act, on which Mr. Justice Crampton also relies, and which enacts, "that every conveyance and assignment respectively executed as required by this Act, and every order for partition and exchange, or for division and allotment,

made by the Commissioners, under their seal, shall, for all purposes, be conclusive evidence that every application, proceeding, consent, and act whatsoever, which ought to have been made, given, and done previously to the execution of such conveyance or assignment, or the making of such order respectively, has been made, given, and done by the person authorized to make, give, or do the same." This seems to us merely to make the conveyance of the Commission conclusive proof that all acts done *before* such conveyance had been done by proper authority, but not to arm any such conveyance with the power of destroying an interest "ascertained" under the order of the Commission. This section establishes a canon to prove the validity of antecedent acts, but gives no authority to do an act not prescribed by the statute.

ART. VII.—MINISTER OF PUBLIC JUSTICE—HIS FUNCTIONS AND DUTIES.

NEVER was a State in a more ludicrous position than we are now in regard to the business of legislation. Crowds of measures are introduced, without the slightest pretension to consistency of purpose, unity of design, uniformity of method, or clearness of expression either to the members of the Legislature or the people at large. Everything is at sea. There are motions for the establishment of the office of Minister of Justice; an almost universal recognition of its necessity; promises to meet the demand by adequate arrangements through the intervention of the Statute Law Commission. Then we have a project for the establishment of an Appellate Tribunal; the Ecclesiastical Courts Bills, the County Courts Bill, the Divorce and Matrimonial Bill, and we know not how many others; which seem to indicate that we are to pursue a policy of piecemeal legislation, without reference to the circumstances of our

time, because in times past we have been forced, under special circumstances, to adopt piecemeal expedients to meet the occasion.

The question of the Law University, or Legal Education, the results of the Inns of Court Commission; the consolidation of the law in a systematic manner; the improvement of our system of law reporting; the scheme for public prosecutors; and many other questions, hang fire, purely from the want of an officer of state armed with the means of conducting the inquiries, the preparation of legislative measures, the passage of them through Parliament, and their judicial administration.

Having one thing to do, we make of it a hundred, because we will not lay hold of the principle, or main purpose; having to give every individual subject his tribunal for the administration of his affairs of justice sufficiently near to his home, we refuse to consider this need as one simple thing, much like the Post Office, or the Excise Office, or the Customs Office, or anything else of the like public sort, whereby we collect from the subject his dues to the State. We choose to start from some by-point, some old effete or imperfect institution, not considering how the new jurisdictions are to be fitted on to old things; forgetting the Scriptural story of old and new bottles; forgetting the individual in our regard for the practitioner, or the persons who live by the existing institutions. The matters just specified need, however, specially to be considered, and are not to be neglected with safety, especially in the period of transition between the present state of things and our ulterior future of better fitness; for it is obvious, that till a new breed of lawyers have arisen, whose education has trained them for the changes which are to take place, we must perforce avail ourselves of those we have, even if it were not that they have much sagacity, and wisdom, and skill, which we shall not easily dispense with.

The end of all the exertions of the law reformer should be to bring home to the individual inhabitant of every part of the realm the due administration of justice, in subordination to one common law and one system of tribunals, acting together to that end.

Now, our statesman-lawyer having such end in view as his object, must, as a statesman, needs act in relation to the State

at large—to the other departments, which, together with his own department, constitute the five great powers of the State.

Of these five great powers of the State, or body politic,—the management and the administration of our forces, taken in the widest sense, as including all the people, of whatever class or denomination,—the administration of public instruction in all its forms; the administration of justice and law; the administration of finance; and the administration of executive affairs, general and local, internal and external,—none perhaps is greater or less than another; and assuredly the administration of justice and law is not the least.

Not disparaging, therefore, any by our selection of Justice and Law for our special topic, but selecting it for comment as that which is peculiarly within the province of this journal, and one of most instant need, if we are to manage the reformatations that are now in progress with due regard to the future development and adjustment of those reformatations in a permanent constitutional state and government, we proceed to consider it, not piecemeal and bit by bit, but comprehensively, in order that we may collect how each part may aid every other part, and facilitate the general task.

The office of Minister of Justice has become an admitted want; but the place which that office is to fill in the State, its purposes, its jurisdiction, its powers, its responsibilities, its indemnities, and its rewards, are not yet understood, simply because the nature of the interests to be served—those of the people, individual and collective, local and national—have not yet been considered.

One should have thought that our great reformers or amenders of the law would have rejoiced in the opportunity which the consolidation of the Statute Law affords, to lay down the foundations of the larger work in the methodical arrangement of the matter, in chart or code; but here again blindness has seized our leaders, from want of the conception of the office which they had undertaken.

Let us now humbly point out the clue by which all difficulty in the work may be eventually removed, and a fabric worthy of the country be *gradually* constructed.

The administration of justice and the law is a work on behalf of the people, not exclusively that of the functionary. It is their interests which are involved; the interests of the people in all their natural states, whether of the person generally, or of man or woman,—from the cradle to the grave, and even beyond the grave,—whether singly or collectively,—whether subject of the State or inhabitant in the realm,—his personal integrity, his safety, his property, his liberty, his action in all ways.

Justice and law are actualities; they do not depend wholly upon the form in which the law consists, whether written or unwritten, confused or unconfused, but chiefly upon the relations of the members of the body politic, and the organization and administration of the State, especially of the tribunals through which the sanction of the law may be obtained. We may consolidate and codify, but our work is only half done, if we have not able administrators of the law. The code, or consolidation, is the declaration or definition of our rights, and of the authorities and powers of the tribunals by which these rights are to be administered; it presupposes the existence of the subjects of the law, and the tribunals, administrators of the law.

Let us, then, before we proceed further in our task, summon before us every person whom the law affects,—every officer by whom the law is to be administered, whether ministerially or judicially, whether in the sphere of administration (or the depositary of discretion and will), or of assistance in aid of the administrator.

Let us have before us, in short, the State,—the People and all the combinations of persons composing the communities of which the people consists, and the Sovereign and all the officers of state who make up in action the sovereign power, whether these officers be appointed by the Sovereign or her ministers and their subordinates, or by the people and their representatives.

Having before us the whole State, the whole people, the whole sovereign power, and every other collective force of the realm of which they are severally composed, let us ask in

regard to each, what is his purpose? what his dominion or jurisdiction? what his powers, personal, or proprietary, or commercial, or official, or judicial? and whether administrative or ministerial, recording or inquiring, judicial or legislative, local or superintending, special or financial?

Having, by no stretch of imagination, but by statistical industry, ascertained the personages just enumerated, and duly classed them according to the categories under which they fall, and found out their designations, and defined their incident properties, and described them in appropriate terms, we have before us all the objects of justice, all the objects of law.

Let it be stated at once, in relation to each person, to what tribunal, or branch of tribunal, he is to have recourse, if he suffer wrong,—to what law he is to appeal in vindication of his claims.

This is the clue to the right administration of the law; each individual should be our test, or witness, of the efficiency of the method. As he finds out in a dictionary the meaning of a word, so he should be able to find, with reasonable exertion, in a body of law, his rights, and the means of vindicating these rights.

It is material, for simplicity's sake, and for comprehensiveness' sake, to keep in view this individuality. Those who desire to withhold the reformatations which the nation seeks, will labour to preserve the muddling confusion of multitudinous notions, scattered here and there, in sundry places throughout our statute-books, and our reports, and other receptacles of the law. But let us speak to the thirty millions of people of these realms each in his individual capacity, and let the law be so expressed, in reference to each capacity, that each may know readily his own predicament; and let each tribunal be so placed, by its local ramifications and agencies, that each individual may have ready access thereto; and we have the whole matter brought down to the apprehension of the most simple understanding.

Nor is it presumptuous to demand such a thing. It is the office and duty of the Sovereign to give the law, and to keep the law,—to do justice according to law; and the Lord High

Chancellor of England is that officer of state by whom this branch of the sovereign power is wielded. Each individual subject is entitled constitutionally to pray the Sovereign by the Lord High Chancellor for justice, where the law fails,—for a clear enunciation of the law, and for its needful amendment.

The two parties who, by the *individual* characteristic of our constitutional system, are at issue in this matter, are the Sovereign by her minister (the Lord Chancellor), on the one hand, the subject individual, by his lawful representative, on the other; and with all respect to the powers that be, let it be said that this is the true constitutional reading of the matter. The minister is under obligation to all and each for the clear definition of their respective rights, and the ready administration of these rights. Having made our law accessible to the Subject by convenient consolidation, we have to provide for him accessible tribunals competent to administer, in subjection to appeal, all his affairs of justice.

Nor is this difficult. We have, it is said, 1,500 stations for the Petty Sessions, 400 stations for County Courts, 100 stations for Assizes. By so ordering these that the land may be covered with stations of justice, as it is covered with stations for the collection of the revenue, and other civil purposes, we may complete this branch of our subject,—the provision for the administration of justice.

The work to be done is to provide for the administration of justice and law, by giving to each subject accessible tribunals and accessible law.

It is for this work that we need a Minister of Justice. To organize tribunals, and superintend and control them when organized; to collect the scattered fragments of our law, and embody them in an accessible form,—consolidated law or code,—and to propound the necessary measures in Parliament, are the subjects of his jurisdiction.

What manner of man is qualified for such a task? How must the limited qualities of any man be supplemented, so as to give wholeness, and promptness, and energy, and completeness to the execution of the work?

Of what sort of persons should his establishment be composed, and how should that establishment be organized?

We have spoken of the department of the administration of justice and law as one of the five great powers of the State. We claim for it a rank, a force, a fund alike and equal to those given to the other great powers of the State; alike and equal to that given to the Privy Council, which is the department of advice and information, or public instruction; alike and equal to that given to the Treasury; alike and equal to those given to the Secretaries of State, commonly so called,—the Home Secretary, the Foreign Secretary, the Colonial Secretary; and alike and equal to those given to the Secretary of State Minister of War.

The minister should be of the first rank in personal qualities and powers; endowed with the courage and prowess of a man; of good *physique*, of intellectual vigour equal to any; energetic and industrious; of good social position; in short, a man of the first order, accepted by his fellows and the people as such, and submitted to from a sense of his superiority in most things.

If the Legal Profession be so fallen that it cannot produce such a man, let him be sought elsewhere, till the law regain its pretensions in this matter.

At all events, let the man be equal to his work;—what the work is, we have shown. Let the country recognize the work, and among our ambitious men there will be found, even in this idle lackadaisical age, competitors for the office.

Of the details of the office we will not speak now; but if we are to have a Minister of Justice, let us also have a Ministry of Justice,—a local habitation, a place where our minister may be seen. The dwarfish character of the position is due to the denial of its fit accessories. The reception of the judges should not take place in a moderate house in a by-street, but at the Chancellerie. Whatever—according to the notions of mankind—is necessary to lend dignity to the office should be given. All that should be expected from the Chancellor himself are the personal qualities befitting the office. The mansion of his office—enough officers having real functions—should be given him; and with the sense of the grand purpose of his office, and of the

power, will come a sense of responsibility, that will go far to make men who fill the office rouse themselves to exertion in the performance of their high vocation.

We have dealt with the people's wants in the administration of justice and law, the immediate means of realizing them, the means of supplying those wants by a pervading system of tribunals and by a consolidated body of law, and the executive means in a well-appointed Minister of Justice, or Chancellor.

But we have to consider out of what family or stock this man may come; how to rear future Chancellors; how to direct the aspirations of the individual lawyer, and thus make the whole body of lawyers—if not fit to take the post—worthy to be its supporters through every gradation of rank, from the Chancellor downwards.

The body of the Profession, as everybody knows, consists of the judiciary, the law officers of the Crown, the Queen's counsel, the serjeants-at-law, barristers, pleaders, conveyancers, and equity and parliamentary draftsmen, superior judicial officers, attorneys and solicitors, students and pupils, besides a multitude of inferior judicial officers, stationers, clerks, messengers, and ushers.

A vast body, receiving vast revenues, but wanting in qualities to make them harmonize with other branches of the community, yet every day, by the progress of the social changes, becoming more and more in harmony with the people at large.

This is emphatically a free class. Everybody by his own choice may belong to the order (except the very exceptionable). The problem is to make the lawyers what they have hitherto been—the palladium of our liberties; for law in this country is the element of stability upon which our institutions depend, and by which our ambitious orders are kept in due bounds. Hitherto its excessive technicality has restrained its uses in every direction, and made of lawyers a body, as we have said, in too slight a degree in harmony with the people. That technicality is broken down, and, its support wanting, a laxity of principle, of thought, and of action, is taking its place, and robbing the Profession of somewhat of its utility.

To intercept the downward course ought to be the work of

our constitutional lawyer, of our Minister of Justice, of the men who are yet to ennoble our Profession. On the other hand, to keep in bounds our future Wolseys and Thurlows, it is necessary to raise the character of the other dignitaries of the law, and to consolidate the Profession.

To effect these two things it is necessary to organize the bodies which constitute the Profession, or at least to counteract the tendency to inorganization or disorganization; to make our judiciary a judiciary in fact, with functions appertaining to that order; to make of our law officers of the Crown and Queen's counsel law officers and Queen's counsel in fact, executing the work which their names import, and receiving their pay expressly for that work; of our serjeants-at-law, people's counsel in fact; to make of these functionaries real bodies, and this not by any strained division of classes, but by giving to each class whatever work appertains to it, and assigning to it the remuneration which is its due.

Thus the Minister of State—Minister of Justice—would be supported in his arduous task, and be himself trained in the earlier stages of his career for his distinguished future. To the want of this training is due the faltering, hesitating demeanour of our chancellors, and the haphazard course of legislation.

It is manifest, that if the law officers of the Crown performed their work of detailed superintendence with the assistance of Queen's counsel, the presidency would be the lot of the Chancellor, and a lot not beyond the strength of a man capable of the office. But an earlier stage is to be considered—the instruction, the training, the probation of our future ministers of justice and law, of whatever grade: for that a Law University is proposed, and that undoubtedly should be the platform of our operations. Here, again, the consolidation of the law affords a means of constituting such a body in due relation to the need, and with the incidental result of providing means for a work which, without such means, can never be effected.

If the members of the University should be the registrars of the annual accretions of the law, whether by Statute or by Common Law, or rather law in action, and the students, under the guidance of the professors, were engaged in the work of registration, the

personnel and the record would grow up together, mutually aid each other, tend to preserve the Code by adequate means, and prevent that want of harmony between the administrators of justice and the law which, as much as any other cause, has led to the inefficiency of both.

If the law should be ordered in its arrangement according to the interests of the people, for whose use it is intended, and if the professors of the law were assigned to the different branches, crossing each other's department by arrangements that would be too much detailed to be spoken of here, the Profession would be brought into harmony with the people, and the lawyers would become trained, not only to be administrators of justice, but to be administrators in the other great departments of state, as by the usage of modern times, especially during the present generation, they have been.

To fulfil this character more completely, we would have a class of barristers (whose office it is to speak and explain), fulfil the duties of professor, lecturer, tutor, and even itinerant instructor in law, and take circuit throughout the country. The habit of explaining their law in relation to the interests of the people would beget a better notion of those interests, and a sympathy with the people for which the class lawyer has not been remarkable.

In these suggestions we have treated of the creation, or rather development of a class, and of its regeneration, and shown how an order of men to fulfil in law the higher grades in the department of the administration of justice and law may be produced; how equal provision may be made for the *personnel* of the Profession, and for the definition and declaration of the law in the shape of Consolidated Law and Code, and the registration of the administration of the law. There are other incidental topics to be considered, and suggestions to be offered as to the steps by which the larger policy may be worked out. To these we propose to advert, not with the intention of detailing the course, which in our brief space would be an impossibility, but of indicating the matters involved, that all may lend their aid.

Our cardinal points are, the people, the State, the direct reference to their wants and interests, their instruction as to

their rights and as to the vindication of those rights. And herein we consult the interests of the Profession, as well as of the people; for if the latter feel that the Profession are their agents for the promotion of their good, or for the defence of their rights, for the conservation of the State and its institutions, and for the protection of the subject, and for the moderation of mutual claims by wise administration and legislation, the Profession will rest upon a rock, and be indeed a noble profession, the object of the esteem, and not of the derision, of their fellow-men.

But to this state of things there is interposed a hinderance greater than the ignorance, greater than the want of sympathy, greater than the want of skill in the departments of business, not specially legal; namely, professional remuneration, and the mode in which that remuneration is earned.

On former occasions we have discussed this subject: it merits the deepest consideration; it is at present the plague-spot of our legal system, alike injurious to the public and the lawyer. We can but discuss its leading points, but we do so with an imploring earnestness, that we may induce every class in the Profession to consider how, by better financial methods, to lead the public to a freer use of professional services, and save themselves from the disasters of which our chancery and bankruptcy proceedings give too many illustrations.

Nobody now visits a lawyer till he needs—till he has got into a mess. Instead of being his friend and adviser, he is treated more as a Cerberus, who guards the approach to the infernal regions; he is employed to remedy when too late, instead of to prevent by early instruction and guidance.

This is due to the manner of remuneration by fee, as well as to some other causes, but principally to the manner of remuneration by fee—by fee, not too high for the work, for we have been at the pains to compare the cost with the work, and generally have found it not disproportionate: it has simply been wrongly placed; but what is worse, it comes to the public as a penalty for neglect, instead of as the price for protection against mischief.

If the people knew more of law, if the tribunals were more

accessible, if our lawyers were our ordinary agents for the more formal parts of business, and for the agency of actual business in official and other tribunals, and if the fee were payable by a per-centage on receipts, or on value of the subject-matter, or work done directly, or through other agency, or by periodical attendance, or on all these methods combined, according to some established principles, both suitor and lawyer would be equally served, much anxiety, negligence, default, and eventually crime would be prevented.

But in order to effect this, the lawyer should be a functionary of a wider range of capacity, he should be emphatically our man of business,—our official, our auditor, our commissioner, according to the rank or scope of his agency; transacting all his business with the method of a man of business, keeping registers, accounts, and correspondence, as well as papers and documents. We want standing counsel and standing solicitors for common people, as well as for great concerns and great people.

Under the old system of extreme profitableness, we have effected a subdivision of labour which requires to be recombined in an office of administration, of which at present we have no example, except in some imperfect Government offices.

For the training of our lawyers there ought to be something more than a University, or the University should include within it such facility. There ought to be model offices and model tribunals, where business should be transacted with the utmost attainable completeness, and the student might learn there how to start, instead of reserving his experiment to be made on the first client who may come in his way.

We have known most excellent lawyers most lamentable men of business, and have observed that more failures result from want of method in business, than from want of law or want of judgment.

It is the fashion to speak of Government offices as badly managed. We believe that all undertakings by Englishmen are, from the same cause,—the special qualities of Englishmen, a rough and ready way of dealing with emergencies as they arise, without much reflection, circumspection, or forecast,—liable to the same defects. What saves the merchant is the wonderful

division and subdivision of labour in all ancillary callings, coupled with the necessity of squaring accounts with everybody at short intervals, in order to avoid the disaster of bankruptcy. The settling day is a grand expedient.

The Law Institution has done great things for the solicitors ; but here, as elsewhere, we want instruction in common things. It is astonishing how few men are really acquainted with the law affecting their personal and domestic relations ; with the law affecting themselves in their parochial, district, or county relations ; with the law affecting them as voters, ratepayers, inhabitant householders, taxpayers, and so on ; and, in consequence, how irresponsible are our officers, both local and general. Now, it is not only expedient that we should have a law well consolidated and accessible, tribunals of competent jurisdiction also accessible, but it is also necessary that we should have agents practically acquainted with every human interest that can be made the subject of law, and with all the convenient practical modes of conducting business ; so that we may have our affairs in good order, ready for any emergency,—for death or incapacity, sudden call to go abroad, sudden claim, or any other circumstance which makes it needful to establish the facts upon which our rights depend.

We have discussed these points for the sake of showing the whole field of the subject,—how much may be accomplished by a Minister of Justice ; how much must be accomplished by the people themselves, or by their legal advisers and agents ; and how much, both of the success of the efforts of the Minister of Justice, and of the people, by their agents, may be effected by the intervention of a Law University. In a country like ours, the powers of the Government, with the best appliances, are far less potent than the social powers wielded by the people themselves, and gradually evolved and wrought out by the slow moral growth of practical experience ; but this, again, is proportionate to the efficacy of public institutions, which, by removing the hinderances interposed by State machinery, or by the want of State machinery, gives greater scope and freedom to the social influences, which depend for their pliancy and success upon comparative freedom of action.

When we cast our minds back upon the progress of the present generation, one sees how much is to be dated from the Reform Bill ; but that of the practical moving power, the far greater part is due to the freedom of thought and action to which that great measure gave play.

What a Minister of Justice could do, would be to give birth to the free energy that wants scope for action. A generous reliance on the truth and intelligence of the country,—a determined enunciation of what should be done,—a frank summoning to aid, of all able and willing to serve, and a candid consideration of the suggestions of all,—with an instant acceptance of what should meet with general approval,—are the necessary means of working at this juncture ; and though, after repeated efforts to incite to a course of this kind, as often ineffectual, we cannot pretend to the hope that we once had, we would fain trust that, yielding to the unmistakable expression of opinion in Parliament, the Government will not for long withhold its acquiescence and support in a better course.

To this end we must come at last, that no good progress can be made in Statute Law consolidation, or law amendment of any sort, without a Minister of Justice, acting under responsibility to a well-informed House of Commons, conversant with the operation of law on every class of its constituents. We believe that no minister will work effectually without this condition ; but then, if there were a Minister of Justice, he would have an interest in bringing the House of Commons to a proper state of intelligence, while anything like a hesitating, devious course would provoke their scrutiny and censure. The House of Commons, too, being systematically charged with measures of law reform involving technical detail, would have recourse to committees to consider such matters systematically : a Committee of Tribunals, and a Committee on Bills and legislative measures, and perhaps one or two others, would find work enough for many sessions to come ; and if the leaders of the various parties of the House—those incorrigible defaulters—were to act regularly on such committees, these measures would take a different position, and become, not only Cabinet measures, to be supported by Government, acting intel-

ligerly and energetically in the prosecution of them through Parliament, but measures in which all parties would feel an interest.

The law officers of the Crown are too much engaged to have the active conduct of weighty measures. They are excellent supporters, but indifferent managers. It is not their *forte*, and it is unjust to cast the duty upon them.

Independent members ought to have more assistance in their attempts. Their services as pioneers in legislation are not sufficiently appreciated. It is of great service to the magnates of the House to have the straw moved by the guerilla force. Members should have the assistance of the officers of the House, reinforced of course by proper aid, in preparing their measures; and we would suggest that it should be a standing order, "That when leave is granted to bring in a Bill, the Clerk of the House should direct a competent officer to attend the gentlemen appointed to prepare the Bill, and assist them in its preparation; and that in preparing every measure, regard should be had to such standing orders as may be in force."

We will not stop now to say what those standing orders should be; it is enough to point out a means of quietly establishing a uniform practice, and of relieving our legislation of the inconsistencies in which it so much abounds.

We have travelled over a wide field somewhat cursorily. It was necessary to bring into view the various considerations that are to be regarded. It is too much the fashion for ever to cry out for some one thing as a panacea for all our ills; with the effect of insuring disappointment from every success. We want now a clear idea of our position; we want an active Minister of Justice; a House of Commons disposed to pay attention to the subject; a Profession willing to assist; a Judiciary conversant with legislation as well as law; a People, and a Press too, alive to their wants; a few large measures of a comprehensive character, instead of a hundred partial inconsistent measures; and above all we want the Statute Law Commission to work effectually in good faith on that work of consolidation, which must be the prelude to any extensive and effective scheme of law amendment.

We say "good faith," for it is scarcely good faith to work upon the present bit-by-bit fashion, and to shut out from participation in the work every person who has bestowed thought upon it, so that no one can divide the suffrage with Mr. Bellenden Ker; employing young men, at inadequate recompense, to assist him;—in fact to do nearly the whole work for crumbs of bread, while he eats the big loaf. It made one almost blush the other day to hear in the House the extravagant eulogiums bestowed upon Mr. Bellenden Ker; eulogiums that obtained no credit, but which we wish could have been sustained by the production of a single piece of creditable work.

The only work that has passed on this head is the Sleeping Statutes Bill, or, as it is more recently called, the Statutes-not-in-use Bill, which has put an end to many obsolete laws that disgraced our Statute-book. This work has been done by Mr. Locke King, a lay member, who ought to be the representative of the Statute Law Commission in Parliament, as he has in fact been its controller and manager there. To him the country owes much for his active zeal for several years, and we believe too for the fact that the Commission has kept on the work at all.

Patiently we wait for the *dénouement*. Parliament has hitherto been deceived. Every year's success in this direction will earn a retribution of disgrace that cannot be postponed for long. We have done our best to avert the evil day; we trust that, let the precise date of the issue be when it may, the work will be done at last.

The strangest thing of all is, that while the utmost discontent is everywhere expressed, by friend as well as by foe, the matter goes on in its present way. This is attributed to the skilful conjunction of allies, from both sides of the House, which Mr. Bellenden Ker has obtained by the present composition of the Commission, a body of names to sanction, not of energies to work; but the failure to fulfil the promises of the early part of the session, made by Sir Fitzroy Kelly, whose bills, it is believed, at the date of the present writing, are not yet ready, has well nigh destroyed this ground of assurance.

Our hope must be in the appointment of a Minister of Justice; a subject which is in the able hands of Mr. Napier, who is to have

the support of Lord John Russell, and other leading men from all sides of the House. The difficulty has, up to the present moment, been in getting a day for the discussion.

We trust that, between this and the ensuing session, the whole subject will take new ground, and that the law-reforming members on both sides of the House will have a field-day, taking care to insist that it is graced with the presence of those personages who constitute the ministerial forces, present and expectant, and that the discussion is so conducted as to make it clear to the people how they are affected by it; that it is not a lawyer's question but a people's question, and that it is of a nature to be understood by every intelligent person, if it be presented by the head and front of the subject, and not in any awkward or bye manner.

"The consolidation of our judicial institutions, and the consolidation of our law, by the agency of a Minister of Justice, devoting himself entirely to the task," may be made, we think, a very intelligible passage in an address to constituencies; and we trust that the discussions in Parliament between the present moment and the coming of our next ordeal (a general election), will be so managed as to make such a passage pregnant with meaning.

For ourselves we beg to intimate that our votes are to be bestowed on candidates who will pledge themselves to the faithful consideration of the practical popular measures indicated by that passage.

Postscript.

The Lord Chancellor's proposed statement having been postponed till a later day in the session, we are compelled to forego our purpose of referring to it in this number. We must follow the example of Parliament, and remit it to our next occasion of meeting our readers, with the simple expression of regret that matters of such deep interest should be so deferred and be kept out of discussion by Parliament and the Press for so long a period.

In the House of Commons, the number of *professing* Law

Reformers is considerable; but we look in vain amongst them for men possessing at once comprehension of mind, knowledge, and, combined with these, that tact and conciliatory demeanour without which the other attributes specified will lead to small results. The harvest of useful measures for cheapening and consolidating our law, for abolishing effete tribunals, and localizing the administration of justice, is indeed ripe and ready for the sickle; but where are the reapers to gather it in?

ART. VIII.—THE EVIDENCE IN PALMER'S CASE.

1. *The Queen v. William Palmer. Official Report of the Minutes of Evidence on the Trial at the Central Criminal Court, May 14 to May 26, 1856.* George Hebert, 88, Cheapside.
 2. *The "Times" Report of the Trial of William Palmer for the Murder of John Parsons Cook at Rugeley.* Ward & Lock, 158, Fleet Street. 1856.
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THE trial of William Palmer, indicted for the wilful murder of John Parsons Cook, demands some notice in our pages, for other reasons than the enormity of the offence perpetrated, or the extraordinary interest which it has produced throughout every grade of society.

It is difficult accurately to define what should make one trial more than another rank among the *causes célèbres*. Sometimes the high position or peculiar relationship of the parties concerned,—sometimes the barbarous cruelty employed, or the remarkable agents engaged to effect crime, or the marvellous mode in which detection has ensued, may give an unusual character to a prosecution; at others a romantic tone and conflicting doubts as to the verdict have left the impress of a real or false notoriety upon the proceedings in the Criminal Court. In later times, the trials of Thelwall, Rush, Greenacre, and Courvoisier, in England, of Burke in Scotland, of Kirwan in Ireland, of

Madame Laffarge in France, of Webster in America, are all fresh in the memory, from some of the causes we have referred to; and the case of William Palmer, investigated at the Central Criminal Court from May 14th to May 27th in the present year, will also henceforth take its place along with them. But the trial of Palmer has other and considerable value to us and our legal readers besides that of its being either interesting or remarkable; and we draw attention to it here chiefly because it raises important questions connected with criminal jurisprudence.

Although our readers are probably not unacquainted with the leading facts of the case through the daily press, we will nevertheless briefly recapitulate them before we draw attention to the points to which we propose more especially to confine our observations. This is rendered the more requisite from the lengthened duration of the trial, and the amount of evidence given thereon. The trial lasted for no less than twelve days, during which eighty-two witnesses were examined, forty of whom were of the medical profession, or connected with its practice.

The case for the prosecution, then, which was founded on circumstantial evidence, and which we may divide into the general and medical, was this;—both Palmer the poisoner, and Cook the deceased, were on intimate terms, following the same pursuit, commonly called the “Turf,” which, whatever may once have been its character, appears, at the present day, to embrace an amount of low blackguardism and systematic swindling out of all proportion to the better qualities of sportsmanship which were wont to be attributed to it. In November, 1855, Palmer was in desperate difficulties: his liabilities appear to have amounted to about 20,000*l*. Writs had already been issued out against him, as well as against his mother, on account of bills of exchange. On some of the bills in question (purporting to represent a sum of 11,500*l*.) the name of Mrs. Palmer had been unlawfully placed, and it hardly admits of doubt that the forgery of her name had been committed by the prisoner himself. Ruin and exposure were thus impending over him, and he was endeavouring strenuously to stave off for a short time the demands of a creditor who held the bills. Now, it happened

that on the 13th of November, Cook won a very considerable sum of money—between 1,000*l.* and 2,000*l.*, in stakes and bets—on a race at Shrewsbury, and he had in his possession immediately after the races on that occasion upwards of 700*l.* in bank notes.

And here commences the horrible detail of a deliberate system of poisoning. Whilst in Palmer's company on the evening following the race, Cook, immediately upon swallowing some brandy-and-water, vomited violently, and declared that there was "something in it," and that it burnt his throat dreadfully, and that "Palmer had dosed him." He recovered from this attack of sickness, and both men left Shrewsbury for Rugeley, and remained there in the society of each other during the next three days, Cook, however, still continuing to suffer from sickness, and Palmer for the most part superintending the administration of his food; but the evidence showed, that whenever nutriment happened not to come through Palmer's hands, vomiting did not supervene. Upon the *post-mortem* examination antimony was found, and the prosecution suggested that the sickness resulted from its administration during the period we are now alluding to. We now come to the Monday (19th November) subsequent to the Shrewsbury races. Palmer left for London on the morning of the day (having previously given Cook some coffee, which made him sick, as before), and returned in the evening. He had employed the day in "settling" Cook's sporting debts in London, and appropriating them, as it appears, to his own purposes. In the evening Palmer reappears at Rugeley, and, according to the evidence of Charles Newton, obtained from the latter person three grains of strychnia; he is afterwards found in the bedroom of Mr. Cook, who had been better during the day. Pills had been prescribed for him by the medical attendants, to be taken in the evening.¹ At midnight, he is

¹ It will be observed that we do not follow the evidence of Mr. Jeremiah Smith, the solicitor, in this case. The reasons will be found in the summing up of Lord Campbell, who, amongst other things, said, of the respectable "professional man," "Can you believe his evidence when he acknowledges himself to have been engaged in such fraudulent transactions, and, being now examined upon his oath, denies his own attestation to that document? Of his credit you are the judges," &c. &c.

seized with frightful convulsions ; his screams are heard by the inmates of the hotel. Palmer comes over from his house on the other side of the street to him, administers some medicine, and he recovers from the attack. The next morning Palmer purchases at another doctor's shop in Rugeley *six* grains of strychnia, two drams of prussic acid, and two drams of Battley's solution of opium. In the evening of this day Palmer administers two pills to Cook. Vomiting and convulsions ensue ; and in the course of an hour or thereabouts Cook dies in frightful agony. A *post-mortem* examination is held at the instance of his father-in-law. The viscera are placed in jars, sent up to London ; Palmer endeavours to bribe the post-boy to break them ; but they are conveyed safely to London, submitted to the tests of Dr. Taylor and Dr. Rees. These gentlemen find, as already stated, antimony, but no strychnia. Palmer had been seen searching the dress and bed of the deceased, and when the money, supposed to have been in Cook's possession, and his betting-book, are sought for, they are not found, and no traces of either, as far as is known, have ever been heard of. We may pass over various other points of suspicion against the prisoner ;—the mysterious cutting of the bladder on the mouth of the jars—the attempts to tamper with the post-master, and his communication with the coroner, as well as various other circumstances detailed on the trial.

We have merely offered an outline of the facts of the case, which, as seen from what we have said, is one of circumstantial evidence. The great difficulty of the prosecution lay in the proof of the *corpus delicti*, or, in other words, in showing that the deceased was *poisoned*, as alleged in the indictment. As it has been said by a learned writer on circumstantial evidence,¹ " In the proof of criminal homicide, the *true cause* of death must be clearly established ; and the possibility of reasonably accounting for the event by self-inflicted violence, accident, or natural cause be excluded ; and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case, and account for all the facts, can

¹ Mr. Wills. See chap. vii. of his treatise " On the Proofs of the *Corpus Delicti* by Circumstantial Evidence."

it be safely and justly concluded that it has been caused by intentional injury; but in accordance with the principles which govern the proofs of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and positive evidence; it is sufficient if it be proved by circumstantial evidence which produces a moral conviction in the minds of the jury equivalent to that which is the result of positive and direct evidence."

That proof of the *corpus delicti* in cases of wilful homicide may be established as well upon grounds of presumption as by direct evidence, is clearly a legal necessity; otherwise the secrecy which attaches to assassination (rendering the crime all the more revolting) would afford certain protection to the worst offenders against society; and the skilful poisoner might, indeed, pursue his hideous art with perfect impunity.

In a recent number of the *Law Magazine*¹ we discussed the subject of "Presumptions in Criminal Cases," and we then took the opportunity of referring to the judgments in *Burdett's case* (4 B. & Ald. 121). These are, however, so apposite to our present purpose, that we shall be excused in again drawing somewhat from the same source. "It has been said in the arguments in this case," observes Mr. Justice Best, "that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof; we are not to imagine guilt when there is no evidence to raise the presumption; but when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it *did* happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." The learned judge appends, however, one valuable remark to the above; viz., that when presumption is attempted to be raised as to the *corpus delicti*, "it ought to be strong and cogent." In the

¹ *Law Magazine* for Nov. 1855, No. cix. p. 374.

same case another learned judge also (Mr. Justice Holroyd) pertinently remarked concerning these presumptions, that "they stand only as proofs of the facts presumed till the contrary be proved, and then presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have, it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does, or does not, produce such contrary evidence." We may remark, in passing, that this last observation applies closely to Palmer's case; for the fact of its lying in the prisoner's power to explain the possession and the use of the strychnia, and his *not* doing so, was most material in enabling the jury to come to a verdict. Those who watched the proceedings day by day anticipated, from the course which the trial was taking, that the employment of the six grains of strychnia (undoubtedly in the prisoner's possession at a critical time) would have been attempted to have been accounted for. It was continually being asked during the defence, "When is the poisoned dog to be produced?" or, "Where is the man who laid the bait for the vermin?" No attempt, however, to adduce such evidence was made.

To revert, however, to the mode of proving the *corpus delicti*, when the charge preferred is of murder by poisoning. It has, indeed, been contended by some authorities, that no charge of this kind should be considered as substantiated unless the poison shall have been discovered in the body; yet this is certainly not a rule of English law.¹ When such evidence is attainable, it is essential that it should be produced; when it is *not* attainable, other evidence is admissible for the purpose.

"In most criminal charges," says Mr. Wills, "the proof of the *corpus delicti* is separable from that which applies to the discrimination of the guilty individual; but it is not so in the cases of poisoning, where it is generally impossible to obtain conclusive evidence of the *corpus delicti*, irrespectively of the explanatory evidence of moral conduct and circumstances. It therefore almost of necessity happens, that there is a concur-

¹ See this point discussed in Dr. Christison's treatise on Poisons, 4th edit. pp. 68, *et seq.*

rence of all or most of these different kinds of evidence, and that the result depends not merely upon their separate force, but upon that additional force which is the consequence of their combination." So in the summing up of the evidence in Tawell's case, the able judge who presided expressed himself with his usual perspicacity on the subject. "In considering," said Mr. Baron Parke, "the question whether or not death was caused by prussic acid, the jury was not to abstain from *looking at the conduct of the prisoner as a part of that question*; they must look *at all the circumstances* of the case," and see whether the prisoner's conduct, and the fact that the poison was in his possession, "did not strengthen them in the conclusion that the scientific witnesses had properly arrived at the result, that beyond all doubt prussic acid was the cause of death." Scientific evidence, therefore, as has been laid down, must, in the class of cases now referred to, be taken in combination with other evidence adduced,—the moral conduct of the accused, and the surrounding circumstances. Indeed, if we look to other great criminal trials, we shall find the same doctrine affirmed in practice. The case of John Donellan, tried before Mr. Justice Buller at the Warwick assizes in 1781, for poisoning Sir Theodosius Boughton with laurel-water, affords a notable instance of very slight evidence being given of the deceased having died by poison; the real strength of the evidence adduced, and that upon which the prisoner was convicted, being derived from other circumstances; such as the conduct of the prisoner, and other grounds of grave suspicion. On the best medical authority in this case, indeed,—that of John Hunter,—it was deposed that the symptoms exhibited by Sir Theodosius did *not* necessarily lead to the conclusion of the deceased having been poisoned at all. Whether the conviction there was, or would be now deemed satisfactory, it is not our purpose to inquire. We have cited it rather as an instance where direct evidence in poisoning cases has been dispensed with.

The mode of receiving and treating such evidence is of course one of the most important duties to be performed on criminal trials; and a judge in summing up has the office assigned to him of explaining and helping the jury to estimate its value and

applicability. The summing up of Lord Campbell on Palmer's trial was not acquiesced in by the counsel for the defence; and the objection thereto is not undeserving of notice. At the close of the charge in question, it will be remembered, the following discussion took place:¹—

Serjeant Shee:—"The question which your lordship has submitted to the jury is whether Cook's symptoms were consistent with death by strychnia."

Lord Campbell:—"That is not the question which I have submitted to the jury; it is a question. I have told them that unless they consider the symptoms consistent with death by strychnia, they ought to acquit the prisoner."

Serjeant Shee:—"It is my duty not to be deterred by any expression of displeasure; it is my duty to a much higher tribunal than your lordship's to submit what occurs to me to be the proper question. I submit to your lordship that the question whether Cook's symptoms are consistent with death by strychnia is a wrong question, unless it is followed by this: 'and inconsistent with death by other and natural causes;' and that the question should be whether the medical evidence establishes beyond all reasonable doubt the death of Cook by strychnia. It is my duty to submit this."

Mr. Baron Alderson here interposed with what sounds like a curious apology for an omission in the summing up of the Chief Justice. He exclaimed, "It is done already—you have done it in your speech."

Lord Campbell thereupon proceeded to explain the part of the summing up complained of. He said:—"Gentlemen, I did not submit to you that the question upon which alone your verdict was to turn was whether the symptoms of Cook were those of strychnia; but I said that that was a most material question, and I desired you to consider it. I said that if you thought he died from natural disease—that he did not die from poisoning by strychnia,—you should acquit the prisoner; but then I went on to say that if you were of opinion that the symptoms were consistent with death by strychnia, you should

¹ See *Times Report*. The Official Report does not give the speeches or summing up.

consider the other evidence given in the case to see whether strychnia had been administered to him, and whether it had been administered by the prisoner at the bar. These are the questions that I again put to you. If you come to the conclusion that those symptoms were consistent with death from strychnia, do you believe that death actually resulted from the administration of strychnia, and that that strychnia was administered by the prisoner at the bar? Do not find a verdict of 'guilty' unless you believe that '*the*' strychnia was administered to the deceased by the prisoner at the bar."

Now, whether the form of putting the question proposed by Serjeant Shee would have been improper or no, there is no doubt but that the case for the prosecution was stated in that shape; viz., that the symptoms of the deceased were inconsistent with death by other and natural causes; and further, as we shall presently see, that the testimony of eminent medical men, called on behalf of the Crown, afforded the answer to the question, as Serjeant Shee submitted it should be put, but conclusively against the prisoner; for they affirm that the symptoms deposed to admitted only of the hypothesis that the deceased suffered from, and died in consequence of, swallowing strychnia. In connection with the mode of leaving to the jury evidence of the kind under discussion, we may cite the summing up of Mr. Baron Parke in the case of Tawell:—

"This being a case of circumstantial evidence," said the learned baron, "I advise you, as I invariably advise juries, to act upon a rule that you are first to consider what facts are already distinctly and indisputably proved to your satisfaction; and you are to consider whether these facts are consistent with any other rational supposition than that the prisoner is guilty of the offence. . . . The point for you to consider is whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that the prisoner has been guilty of the offence? If you cannot, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such a supposition. All that can be required is, not absolute positive proof, but such proof as convinces you that the crime has been made out."

In another part of the same charge the learned judge, in reference to the argument urged, that the deceased might have died from sudden emotion, remarked that it undoubtedly was within the range of possibility that a person might so die, without leaving any trace on the brain; but the jury were to determine if they could attribute death to that cause; if they found strong evidence of the presence of poison, and further, when the result of the evidence gave them the existence of a cause to which death might be rationally attributed, they were not to *suppose* it was to be attributed to any other.

There are cases easily to be conceived, in which—unless the jury were convinced that the symptoms attending a death were inconsistent with every other theory except that of death by a specific poison—a conviction would be most dangerous, but we cannot pursue this subject here any further.

The jury in Palmer's case asked no questions during the very prolonged sittings, and gave no overt sign, as we have heard, which could enable any one to prophesy how their minds were disposed with respect to the evidence; but we believe there was no necessity to have mistrusted its proper effect, had it been even left to them in the way suggested by the counsel for the defence.

We will now proceed to notice briefly the medical evidence against Palmer.

The medical evidence in question may be divided into two parts; first, that of chemists who have deposed to the nature and value of analytical tests for the purpose of discovering poisons; secondly, that with respect to the operation of poisons (especially strychnia) physiologically upon animal life.

Observations fell both from the Bar and the Bench on this trial which have drawn serious attention to the character of the medical portion of the evidence. "I reverence the man," says the Attorney-General, "who from a sense of justice and an innate love of truth comes forward on behalf of any accused person who is in danger of being swept to destruction by the torrent of prejudice; but I have *no language to express my abhorrence for that traffic testimony which from professional pique, or for the sustentation of a particular theory, men of*

science — I grieve to say it — occasionally are led to offer." "Audacity" and "dishonesty" are also charged to the account of certain medical witnesses by the counsel for the prosecution, and in unmistakable language. Again, Lord Campbell, in his summing up, observed: "With regard to the medical witnesses called on the part of the prisoner, I must observe, that although there were among them gentlemen of high honour, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness. You must say, gentlemen, whether some of those who were called for the prisoner belonged to the category I have described—that of a witness becoming an advocate You recollect the way in which Dr. Nunneley gave his evidence, and you must form your own opinion as to the weight to be attached to it. Certainly he seemed to display an interest not quite becoming a witness in a court of justice; but you will give every attention to the facts to which he refers, and to the evidence he gives." There were also other remarks made which it is needless to recall here, but which convey reflections on the medical evidence enough to demand from us some investigation into its real character. And let it be remembered, that if it should ever unfortunately become a well-recognized fact that there is a regular witness-market, whence may be procured scientific, professional, or technical evidence as it may be wanted, the most dire consequences must ensue. There will be placed in the hands of a powerful and malignant prosecution a frightful engine for cruel injustice; for, we may depend upon it, its use and application will not be confined to defences. And out of this evil, moreover, will grow another, viz., scepticism as to the real value of this species of evidence whenever it is produced; and that which ought to be of paramount importance in arriving at the truth, will be reduced to a useless parade of tainted testimony.

Let us take, in the first instance, the evidence adduced in the case before us with respect to the chemical experiments

employed to discover the presence of strychnia. Dr. Alfred Swaine Taylor, of Guy's Hospital, was an important witness here; and he stated that, on the examination of Cook's body, he found no prussic acid, opium, or strychnia: "With reference to the search for strychnia, the part which I had to operate upon was in the most unfavourable condition that could possibly be for finding that poison if it had been there;" and he proceeded to explain such condition. Dr. Rees confirmed this statement in almost the same language. Both of these scientific men further affirmed that "the poison is first absorbed into the blood, it is thus circulated through the body, and it especially acts on the spinal cord;" that is, the part of the body from which the nerves affecting the voluntary muscles proceed. "I believe," says Dr. Rees, "that strychnia is absorbed before it produces its symptoms. If by accident or design enough strychnia is given to destroy life, *that might be the consequence, I believe, without my being able to discover it after death.* I quite agree with Professor Taylor that it is the *excess* you find; that when vitality is destroyed by the excess of the poison, and an excess remains, you can *discover that with care sometimes.*" "I saw the experiments which Dr. Taylor tried on four of the rabbits, not on the fifth. I assisted in the analysis made of the animals; we destroyed four animals, and failed to detect it in three." Dr. Taylor himself gave his opinion broadly on the question of discovering strychnia, and said that the statement that if strychnia caused death, it would be always found in the body, *is untrue.*

It should be observed, however, that it was admitted by Dr. Rees that "we have no facts with reference to strychnia on which to found our judgment" as to its action as a poison by absorption; but Dr. Robert Christison confirmed the theory, and stated his opinion that when the quantity of strychnia is small, he would not expect to find it; but when there is an excess over the quantity necessary to destroy life by absorption, he would expect to find it, assuming that the excess is considerable. The ordinary tests upon the same authority are affirmed to be "uncertain in some respects." Dr. Christison added, with reference to the particular analysis which had been

made in this case, that if he had been called upon to analyze such a stomach, he would have entertained no reasonable expectation of doing any good with it, unless a considerable quantity of the poison had been present. This theory of "absorption" and "excess" is perhaps more clearly (though modestly) expounded by Mr. George Morley, a surgeon.¹ "Is it your theory," he is asked, "that in the act of poisoning the poison is absorbed, and ceases to exist as poison,—as strychnia?"—"I am inclined to think so. I have thought much on that question, but have not decided in my mind. I incline to think it is so. I believe a part undergoes a chemical change." On being pressed by the Court upon the statement, he says, "I believe part may be absorbed unchanged, a part may undergo a chemical change, and a part may remain in the stomach unaltered." Dr. Taylor's version of the theory is substantially the same,—"*Strychnia* is in a great part, too, changed in the blood, it undergoes a chemical change;" and he adds, "Supposing the minimum of the dose required to destroy life to be given, I do not think I should find any."

Now let us see what the chemists for the defence depose upon the same subject. Dr. Nunneley says, "I have experimented upon the bodies of animals poisoned by strychnia, with a view of discovering the strychnia poison in the body, the body being in various stages of fermentation and decomposition, from a few hours after death, at various periods up to the forty-third day, the body being quite putrid in the latter cases. I have not failed in any one case to discover the poison by the tests which I have applied." Again, he is asked, assuming Cook had died of strychnia, whether the poison *ought* to have been found by proper chemical analysis? and he replies, that "if death were produced by a minimum dose of strychnia, there would be no decomposition that could prevent the discovery of it;" "it would remain as strychnia in the system."

Next comes Mr. William Herapath, Professor of Chemistry and Toxicology at the Bristol Medical School, who says, "I am of opinion as a chemist, that when strychnia has been taken in a sufficient dose, it ought to be detected by chemical science up

¹ Official Report, p. 101.

to the time that the body is decomposed. I do not think putrefaction would decompose it completely. By decomposition, I mean when the body has become a dry powder." And again, "having heard the evidence as to the jar which was conveyed to Dr. Taylor, I am of opinion that the jar containing the stomach, as is now stated, in the state it then was, *from my chemical knowledge, that strychnia ought to have been detected if it existed there !*" Some irregular attempt was made by the prosecution to show that this witness had formed and expressed an opinion that the poison had really been administered, but that Dr. Taylor could not find it; but the so-called "opinion" turned out to have been only expressed in conversation turning upon newspaper stories, and Mr. Herapath's evidence as to the conclusiveness of chemical tests was left as we have recounted it. Dr. Julian Edward Disbrowe Rogers affirmed to the same effect, and deposed, moreover, to the fact that he had found strychnia in the blood of a poisoned animal by colour tests, and to his belief (assuming Cook had died of this poison) that he, the analyst, should be able to find it *now* in the tissues of the body. Dr. Letheby denies that when strychnia is absorbed into the blood the poison is changed, or that the colouring tests are fallacious, and says that if the poison had been in the jars submitted to Dr. Taylor, he ought to have found it.

Dr. Francis Wrightson (introduced as a pupil of Liebig, and landed by the Court for the manner in which he gave his evidence) appeared also as witness for the defence, and thus deposed:—"I have found no extraordinary difficulties in the detection of strychnia; in my opinion it is a poison to be detected by the usual tests. I have detected strychnia pure, and I have also discovered it when mixed with impurities, after separation from such impurities. I have detected it in mixtures of bile, bilious matter, and putrefying blood; . . . it can be detected in the tissues. . . . I have heard the theory propounded by Dr. Taylor as to the decomposition of strychnia by the act of poisoning. I am of opinion that *strychnia does not undergo decomposition in the act of poisoning*. If a man," continued Dr. Wrightson, referring to the case of Cook, which was put

¹ Official Report, pp. 172, 173.

before him, "had *certainly* been poisoned by strychnia, I should *certainly* expect to find it." Dr. William Macdonald adhered to the same view also, and, moreover, stated, that to his knowledge no scientific man before Dr. Taylor had ever propounded the theory that strychnia is decomposed on absorption, which he rejected altogether, as he did too the supposed fallaciousness of colour tests. The contradictions here are manifest and great. High authorities affirm very positively that, by proper chemical tests, the fact of the strychnia having been administered ought to have been satisfactorily determined, while the distinguished analysts employed by the Crown excuse their not finding the poison, first, from the facts of the difficulties which they allege surrounded the case; and, secondly, they explain their failure by a theory which it would seem is not sustainable; viz. that of the decomposition of the poison after it has been absorbed into the circulation. If the medical part of the evidence for the prosecution had merely rested on this testimony, the jury could not, we think, have come to the conclusion that the unfortunate man Cook had been poisoned by strychnia; for, assuming Drs. Taylor and Rees to have been the skilful analysts which they are represented to be, there would have been good ground, considering all the evidence adduced, to have inferred that probably strychnia was *not found* in the body, because it *was not* there. There remains, however, the second division of the medical evidence to which we have referred; viz. that which related to the symptoms preceding the death of the unfortunate person Cook.

Many were the witnesses who were called to give evidence as to the symptoms displayed by animals generally poisoned with strychnia, and as to the nature of its operation on human life. On the part of the prosecution appeared Mr. Thomas Blizard Curling (of the London Hospital), Dr. Todd (of the King's College Hospital), Sir Benjamin Brodie, Dr. Solly, and several other practitioners, who either were supposed to have great general knowledge on the subject, or who had had in their practice particular experience in cases of poisoning by strychnia.

The proposition of the counsel was, that Cook had died of *tetanus*, produced by strychnia. It was therefore essential to

show how the symptoms in his case were distinguishable from traumatic tetanus—that caused by wounds, or idiopathic tetanus, which, as not arising from external injury, we may popularly call constitutional. The symptoms upon which the medical witnesses had to form their opinion were principally those deposed to by the local practitioner, Mr. W. H. Jones (who was present with the deceased when he died), and by the chambermaid, Elizabeth Mills, and they all gave their deliberate opinion that the symptoms described were not consistent with any form of traumatic or idiopathic tetanus. “Perhaps I had better say at once,” says Sir Benjamin Brodie,¹ “that I never saw a case in which the symptoms that I heard described arose from any disease. When I say that, of course I refer, not to particular symptoms, but to the general course which the symptoms took.”

Again, as opposed to the above evidence, we will take that of Dr. Letheby, who says, “I have heard certain symptoms described as attending the death of Mr. Cook. I have witnessed many cases of death from poisoning by strychnia,—many of the lower animals; and several cases of poisoning by *nux vomica* in the human subject, one of which was fatal. The symptoms that have attended the cases of the animals that I have seen, *do not accord* with the symptoms described in this case;” and he then mentions the distinctions of the symptoms; such as the interval of time between the poison being administered and the convulsions supervening, the state of the heart, &c. &c.; and he avers that “Mr. Cook’s death is irreconcilable with everything I am acquainted with.” So Mr. Partridge “could form no positive judgment as to the cause of death,” but thought it was most important in a case of death from convulsion to examine the spinal cord shortly after death; and he further held that the symptoms described were in several points inconsistent with death by strychnia. Again, Mr. John Gay, of the Royal College of Surgeons, affirmed that “in the event of a given set of symptoms—tetanic symptoms—being proposed, it would be extremely difficult, if not impossible, without some other evidence, or collateral evidence, to assign it to any given disease

¹ Official Report, p. 99.

or cause." "The cause of death," says a Dr. William Macdonald, "was epileptic convulsions, with tetanic complications." Other witnesses also were called to support the theory that epilepsy might have been the cause of Cook's death; and one learned person proposed the explanation of *angina pectoris*. "Looking at this case, with the interval occurring between the two fits, I should, speaking scientifically, certainly say that the person suffering under them was more likely to be labouring under *angina pectoris* than strychnia."¹

The above account of the conflict of medical evidence is calculated to suggest painful ideas. Either the subject is very obscure, and these scientific witnesses have rashly dogmatized where they should have been modestly silent; or, while the facts of the case were such as to warrant certain obvious conclusions, others were promulgated in fraud of justice, and in contempt of truth. In "running-down cases," when the pot-house friends of the cabman combine to make his story good, and the uneducated companions of the van-proprietor conspire to support *his* version of an accident; or in gross election disputes, we expect, and assuredly find, perjury of all degrees and shades, from that of the strong partisan who first persuades himself of an untruth, more or less firmly, and then steps forward to depose to it more or less stoutly, to the hardy miscreant who believes something or *nothing*, as the case may be, but who will swear *anything*, and "come up to the mark," for the proper consideration. But we hope we are not driven to infer from Palmer's case, as some do not hesitate to say we must, that, under the shelter of professional technical knowledge (which can be less easily tried by the tests of ordinary knowledge), a body of so-called scientific men may be procured to violate truth, and dishonour the name of science.

We have not, be it observed, pursued in detail the cross-examination, or described the demeanour of certain witnesses in

¹ It has been stated, but we do not know whether upon good authority, that one medical man was importunate to be called to give evidence that the symptoms exhibited by Mr. Cook could have been those of *hydrophobia* only. This *angina pectoris* theory took the Attorney-General by surprise; and though, as we believe, not entitled to attention, it remained unshaken by any cross-examination.

the case before us, which, however, while it showed the value which belonged to their evidence, has exposed them justly to severe animadversions. We do not care to single out individuals to illustrate our position. To such of them as asseverated that the facts of the case were inconsistent with death by strychnia, and consistent with the various other causes which were assigned, it is enough now to say that neither the jury believed them, nor, we may add, the judges, nor any other competent persons who had an opportunity of forming an opinion. Well might the prisoner in the dock send down a note to his attorney, during the examination of one of his medical witnesses, to the effect that "this muff is doing more harm than good." If we are rightly informed, there were many more "muffs," or worse, proffering vain and ambiguous testimony, but whose offers fortunately were not accepted. The witness-box seems to be sought by some as a cheap advertisement, by others as the means of contradicting or discomfiting a rival; but from whatever cause it may arise, the worst danger to the administration of justice, and the greatest injury of the scientific character, will be incurred whenever it shall be known that professional witnesses may be *retained* to establish indifferently a case for either side. This is no fanciful danger; for we believe that there are few lawyers of considerable practice who could not within their experience give instances of the profligacy with which scientific testimony is tendered, and not in criminal cases only.

Far be it from us to characterize any profession, much less the medical, as generally untrustworthy or dishonest. Amongst its members are some of the brightest ornaments of society. It would, indeed, be the height of absurdity to condemn medical men as a class, or to accuse them of habitually violating one of their highest duties—that of deposing truly to facts within their observation, when called on so to do in courts of justice; but that there have been frequent occasions when, to use Lord Campbell's expression, the medical witness is turned into the retained advocate,¹ is as true as it is grievous, and when such

¹ Lord Campbell's antithesis really signifies this—that the witnesses he describes, under the pretext of swearing to a *fact*, depose to the consequence

occasions occur they call for most unrelenting comment. We dismiss now any further observation on this head.

As we have been led to make these remarks on professional morality, it is not altogether out of place to refer to the reflections which have been cast upon the Bar,¹ with regard more especially to Palmer's trial. There are some popular portions of the press which habitually delight in attacking the conduct of counsel. A writer in a newspaper, for instance, picks out what he thinks, or supposes he may lead others to think, by "smart" writing, to be an error in the counsel in conducting his case; forthwith he slips on the snow-white garment of the rigid moralist, and pens a virtuous and indignant article. Thus our moral contributor, sitting up in his apartments in a London street, tries a capital case some 300 miles off, which the law has however confided to the care of twelve weak jurymen, one imbecile judge, and perhaps four or five corrupt barristers, of large experience in criminal cases; and if the verdict is opposed to that of the self-constituted arbiter, and if the learned counsel for the defence cross-examine effectively, and speak eloquently, he is forthwith denounced by the upright author of pungent articles, and his name is righteously exposed to obloquy! Generally speaking, the spiteful paragraphs we are alluding to, although pointed at individuals, in order to give them the better zest, are really attacks, but ignorantly made, upon the principle of advocacy itself. They mean this (and apply equally to civil as criminal cases)—that inasmuch as it is assumed that one party to a suit or prosecution must always be in the wrong and the other in the right, the counsel who appears for him who has the law against him, is a conspirator with his client, who has injured his neighbour and refuses to

of an argument, whether it convince them or no, and independent of their belief in the truth of the premises or the accuracy of the reasoning, and the conclusions which they affirm. *Counsel* are bound to present arguments (whether convincing to themselves or no), and the Court decides on their soundness;—*witnesses* are bound to affirm their belief or their knowledge—the truth, the whole truth, and nothing but the truth, as they are convinced of it.

¹ We do not here refer to the contemptible and very stupid pamphlet spoken of in another article in this number, and which is supposed to have been concocted by a disreputable person connected with the Legal Profession.

atone for it. Now, it is too late in the day to argue about the morality of the advocate's profession. If any one really think it unconscientious for a lawyer to hold a brief until he has tried the case himself, and determined on the rectitude of his client, we will not quarrel with this opinion. We should, however, commend to his notice the conversation on this matter, now known to readers of books these sixty years, which was held between the poor doubting Boswell and Dr. Johnson:—"But do not you think, sir, that it is wrong to defend a person you know to be guilty?" asks the pure Boswell. "You do *not know* it, sir," answers the moralist; and in his own great way he explains the theory to his worthy biographer, as most of our readers must well remember.

In fact, no counsel appears for a prisoner who does not, by the very act of his standing up in his defence, protest the innocence of his client until the contrary be proved. He is to discredit the material statements preferred against his client, dispute the arguments adduced, dislocate the links of evidence presented, and insist with all his might and main upon the truth of his client's plea—"not guilty." He is not to admit into his own mind, and must exclude from the minds of others, any idea but the innocence of the man whose interests he is to protect, or he will place his client in a worse position than the law has placed him in. As Lord Campbell observed, the protests of a prisoner's counsel (who in uttering them is precluded from drawing the distinction between his professional and personal character) are in fact but equivalent to the plea of "not guilty." The common form employed by the advocate, who says to the jury, "After having heard the evidence, you will be able to come to no other conclusion but that of the innocence," or "the guilt of the prisoner," necessarily involves the notion that the effect of the evidence on the mind of the advocate himself is in harmony with that he imputes to the jury. The particular language, however, used on this occasion, afforded a convenient peg whereon to hang abuse of the Legal Profession, and a personal attack upon the eminent advocate who was concerned for the prisoner; and the opportunity was of course seized with vicious avidity.

The convict, as we have heard, went to the scaffold denying

that he killed Cook by strychnia. Whether this was a subterfuge whereby the wretched man deceived himself into the belief that he was not positively stating a lie, it is useless to inquire; but probably he was right. It was *not pure strychnia* by which Cook was poisoned. The drugs ordinarily used by chemists and apothecaries are disgracefully adulterated; nay, it is notorious that one kind is often substituted for another. Now one grain of pure strychnia is a death-dose. The first purchase by Palmer of the poison of Newton¹ was *three* grains. Whatever amount may have been administered, it produced frightful convulsions, but did not prove fatal. The second purchase was *six* grains, and death ensued. Brucia (an extract of the *rus vomica*, as well as strychnia) is stated by Dr. Taylor to be often mixed with, and substituted for, strychnia, and is of one-sixth to one-twelfth of its strength; and he says, "unless you are sure of the purity of the article sold to you, you may be misled as to its strength." Now if three grains of the article first procured were impure, the failure in its effecting death is explained; but the *six* grains also of the impure drug, bought on the second occasion, might probably be just the quantity which would prove fatal. We have not heard, however, that the prosecution took the pains to test the qualities of the poison in the strychnia-bottles at Rugeley, although it seems to us that it would have been a very proper course to pursue. And we may, *en passant*, observe, that experiments which *since* the trial have been made touching the effect which antimony in combination with strychnia has upon the discovery of the latter in a *post-mortem* examination, might well have been made *before* the trial.² Possibly, also, an investigation into this (as, indeed, is affirmed upon some authority) might have prevented the exceptionable theory of decomposition of the poison in the blood being promulgated in court, by furnishing another

¹ It has been said, on good authority, that the man has admitted that he sold it in the form of *pills*: at the trial he stated it was in the form of powder.

² The theory of the Attorney-General that Cook was *prepared* by antimony for strychnia seems very unnecessary. The evidence shows an intention to kill Cook by antimony, which was too slow in its operation, and strychnia was consequently resorted to.

sufficient explanation of the failure of the chemical examination.

We have just noticed that Palmer is said to have died without a confession of his guilt. To our minds this is of no value, so far as regards the propriety of the verdict and justice of the sentence. According to some continental systems, the confession of a prisoner must be extorted before he suffers the extreme penalty of the law. With us, although an admission of guilt may occasionally satisfy the scepticism of some people, and as proving penitence may be a relief to the minds of others, yet non-confession, as the annals of crime demonstrate, affords no ground whatever for inferring innocence. Physical temperament, strength of nerve, habitual hardihood, indifference to this life, and an inability to conceive of another (the prominent cause of this recklessness of the type of the immoral and brutal man), nay, even the desire of revenge, which, we know, is stronger with some men than the fear of death itself, may each be ample cause to induce a criminal to persist in his lies, though standing on the threshold of his doom. So, too, the demeanour of a prisoner during his trial is no test of innocence.

The "coolness" as it was called of Palmer during his trial was no doubt very great. Thus we are informed that whilst the evidence was accumulating against him in fearful masses, he leaned over the dock to learn who was "the winner of the Manchester cup." Thurtell went, however, further than this. A few hours before his execution he remarked, "It is *perhaps* wrong in my situation, but I own I should like to read Pierce Egan's account of the great fight yesterday," referring to the prize fight between two great heroes of the ring,—Spring and Langan. Tawell, too, another hard-souled villain, affords an example where confession was not resorted to by the convict to relieve his own mind, but made in indifference. Upon being pressed for it, this wretched man alleged that as he had promised it he would perform his promise. Whether the confession in this case was true or not has never indeed been tested; for though the extraordinary version he gave of the murder has leaked out, it is not known upon any authenticity which we can

cite. "It is true," says Sir Fitzroy Kelly, in a recent letter to Mr. Herapath relating to Tawell's trial, "that he confessed; but I have the best reason to believe his confession was that he committed the murder indeed, but in a manner totally inconsistent with the truth of the scientific evidence upon which he had been convicted." Sir Fitzroy assumes the truth of the supposed statement of Tawell, which is more than we would do without sufficient corroboration; for the letter continues, "If this be so, it affords a remarkable proof of the caution with which all evidence of this character should be received."

There is also another point with respect to confessions, which should not be forgotten; viz., the mental reservation which is not unfrequently practised by a criminal. A part of the fact is truly narrated, upon the strength of which credit is taken to distort or deny others, whether material or immaterial. Thus, one of the horrid arsenic poisoners, Schönleben, whose long-continued iniquities are elaborately detailed by Feuerbach, *did* acknowledge that she had placed arsenic in a salt-box, but persisted to the last that she had not mixed any in the salt-barrel; although there could be no possible doubt of this fact, as well as of the former. An experienced authority, Colonel Chesterton,¹ in a recent work, has some remarks upon the subject of the confessions of criminals so pertinent, that we shall borrow them. He says:—"There was something perfectly ridiculous in the all but universal claim to innocence on the part of convicts of all degrees. If ever an individual were found sufficiently candid to avow his fault, the rare exception would arise amongst those of superior education. But even in such a case this would be intermingled with so much qualification, that the plea of justificatory circumstances would greatly detract from the honesty of the confession." Does any one doubt of the guilt of the demoniacal Rush, or of many others who died in sullen silence, or vehement protest of innocence?²

¹ Revelations of Prison Life. 1856.

² There is one solemn protest of innocence, however, that of Elizabeth Fenning, tried in 1815 for attempting to poison the Turner family in Chancery Lane, which we think to have been true. The evidence offered was the best example of imperfect and inconclusive circumstantial evidence which the lawyer can find reported. In addition to which, the person who

Recent criminal trials have brought before the public mind two points (amongst others) of great importance; the one is the facility which medical knowledge offers to the crime of poisoning; the other, the temptation which life insurance presents to the embarrassed and unscrupulous. Tawell was a chemist, Palmer a medical man; and other cases will also occur to the recollection of the reader, which for obvious reasons we do not here more particularly specify. The evil first referred to is one belonging to the nature of things, and we can suggest no practical safeguard. But with respect to insurances, it is a subject for consideration—seeing it was found needful to meet the evil of burial-clubs among the lower classes—whether that of speculation on life amongst the higher, apart from commensurate interest, does not call for some legislative interposition. Insurance companies are now heard declaring they are continually defrauded, and even point to murder as a means employed to rob them. Do they use ordinary caution for self-protection? Is it not notorious, for instance, that within a very short period one case has come to light where an unfortunate man, in impoverished circumstances, and with a certainty of speedy death before him, trafficked on his own life—effecting policies within one year to the amount of *many thousand pounds*, and disposed of them to wealthier speculators, who bought them of him immediately at a premium? Do insurance offices examine the facts of the case fairly *before* they grant policies? or, in the struggle to do business, are they reckless or indifferent? and do they not thus connive at the iniquity which they afterwards are ready to plead as an excuse for non-payment? We will not enter upon the subject more at large; but it is one which calls at least for serious consideration. No doubt unnecessary legislative interference with contracts is to be deprecated; but the question is what *is* needful.

That Palmer was a speculator on lives, no one can doubt; and how he could have made any profit by insuring for 25,000*l.*

had mixed the arsenic in the food, admitted the crime when on the point of death. Such a terrible miscarriage of justice could hardly nowadays be permitted to occur. Sir Samuel Romilly has recorded his impression of this case in his Memoirs.

the life of the stableman George Bates, "Esq.," except upon the supposition that he was to be disposed of, we own we are at a loss to conjecture. Palmer, during the year 1855, had insured his own brother's life for 13,000*l.*, and had made proposals to different other offices for about six times this amount. The life dropped within twelve months. So, too, the wife of Palmer died after the payment of the first premium on a large insurance effected by the husband. It is impossible almost to avoid the horrible suspicion that the verdicts of the coroner's juries on these two cases are well founded, and that both were the victims of a murderer, for the sake of the insurances; and further, that he had in contemplation the death of Bates. Wainwright's atrocities years back, too, are not forgotten; and there are certain directors of insurance offices who could unfold tales of no imaginary horrors, which have of late incidentally come to their knowledge, though they have never been, nor will now be, brought to light. Such facts as these at least suggest to our minds that there is a stringent need for insurance offices to mend their ways themselves, if they do not wish to have them mended by the law.

ART. IX.—THE DYCE-SOMBRE CASE.

THE very remarkable circumstances of this case, and the proceedings to which it has given rise in our Ecclesiastical Courts, are well fitted to engage the attention of the Legal Profession, but not less to attract the notice of the Legislature, before whom the structure as well as the functions of those courts are at present under discussion. It is, however, by no means our intention to enter minutely into the questions, whether of fact or of law, which have arisen, nor, indeed, to give even a summary of these; because the field is of great extent over which we should be obliged to travel, and because the concurrent judgment of the two Courts which dealt with

the case leaves no possibility of doubt upon the main features,—of the testator's insanity and the invalidity of his will,—as well as of the conduct of parties severely censured by all the judges, and of the ignorance or gross carelessness which marked the proceedings in other countries on the same subject. It is upon these matters, now placed beyond all question, and upon the heavy costs of the litigation, unfortunately equally undisputed, as well as the incidence of these costs—the only thing on which the two Courts differed,—that we purpose to offer some observations.

Upon the nature of the case it may be enough to state, that Mr. Dyce-Sombre was of European descent by the father's side,—his father and paternal grandfather being British subjects; his mother European by her father and grandfather, but probably her mother, and certainly her grandmother, Hindoo. He had, therefore, both European and Asiatic blood; but the former greatly predominated. He was educated and passed his earlier years partly in European, more in Asiatic, society; but there appears no proof that his habits were such as could account for the peculiar feelings under which he afterwards laboured, or that either his mixed descent or his eastern associations give the least contradiction to the clear evidence of his labouring under delusions respecting his wife's conduct, by showing that these were an exaggerated form of oriental jealousy. The favour of a begum, who had been married to his mother's grandfather, General Sombre, and who adopted him from kindness towards the memory of her husband, though without any relationship to him, gave him the entire control of her affairs; and she left him at her death, in 1836, property amounting to half a million sterling. In 1838 he came to England, and two years after married the only daughter of Lord St. Vincent. This lady survived him, and became, with his two sisters, entitled to his personal succession, in case he died intestate. He having, in 1849, made a will, these three parties opposed the probate on the ground of his insanity. One of the executors, Mr. Prinsep, and the East-India Company, as residuary legatees, for themselves and in trust for other legatees, maintained the validity of the will. The

Prerogative Court decreed against it, refusing probate, and condemning the party propounding, and the East-India Company intervening, in the costs of the suit. The cause was appealed to the Queen in Council, and the Judicial Committee affirmed the decree of the Court below, refusing probate, but altered that decree in so far as it gave costs to the parties impugning the will ; on the contrary, it gave costs, out of the estate, to the parties propounding the will, and also gave them the costs of the appeal, not only of the litigation in the Appellate Court against the costs decreed below, nor even only as against the refusal of their costs below to those parties supporting the will ; but also their costs in the Court above, incurred by maintaining the validity of the will against which judgment was pronounced,—their costs incurred by disputing the decree below refusing probate, that decree—that refusal of probate—being affirmed, and the contention of the appellants pronounced to be groundless.

Upon the subject of costs there is a material difference between the principles and practice of the Consistorial Court and those of other courts. There is the same peculiarity in the proceedings respecting appeals from the Colonial and Indian Courts. The peculiarity is this : where an appeal succeeds, and the judgment below is reversed or altered, the appellant may have his costs of the appeal. In other courts, the general rule is, that the plaintiff in error at law, or the appellant in equity, cannot have any costs of his appeal, how successful soever he may have been : his costs below he may have, as well as his relief from the order to pay those of his adversary ; but costs of the appeal, or writ of error, he can have none. We believe the opinion is very general, that this is a defect in our procedure, and that the better practice is that followed in the Judicial Committee, as well as in the courts of intermediate appeal. In most cases, undoubtedly, the party possessing the judgment below may so far be presumed in the right, and the Court below to have rightly decided for him, that he may be considered entitled to defend that judgment in his favour ; but it may well be that there was fair ground of appeal ; that this is shown by the reversal ; that the Court below having erred, is no ground of

refusing relief to the party found in the right; and that justice cannot be done to him unless the party found in the wrong shall bear the expense of correcting the error. It should seem to be the better course that the Court of Appeal may exercise in all cases its discretion as to the costs of the appeal, leaning only towards the refusal, but not peremptorily and as an inflexible rule. There seems, however, much greater doubt on the question of allowing the appellant his costs when he fails, and has the judgment against him affirmed. This of course can only be permitted in very peculiar circumstances (of which the Dyce-Sombre case may be supposed to afford two examples), as when there was a duty cast upon him to appeal, or when he has been successful upon the matter of costs below, on which alone there possibly might have existed no right of appeal. The Court appears to have considered the executor and the East-India Company as trustees, and bound to appeal. They certainly considered them entitled to their costs below in that capacity. The question, however, arises, first, whether, as trustees, they were not justified in resting satisfied with the decision below; and next, whether, when that was affirmed on all but the costs, there should have been given to the appellants more than the costs of the appeal occasioned by the error as to costs below. They have, on the contrary, had the far heavier costs occasioned by their appeal on the whole case; that appeal having been decided against them by the affirmance. It raises another doubt on the correctness of this decree of costs, that the course of proceeding of the appellants is much blamed by the judgment; and its effect was no doubt both to increase the mass and the expense of the litigation, and to prevent material evidence from being obtained. But our remarks are independent of this accidental circumstance, and go to the principle.

We must add, that we entertain no doubt as to the course taken by the Court being sanctioned by authority. There were in all probability precedents in the Consistorial Courts of similar decrees. We venture, however, gravely to doubt if the same order as to costs would have been made in a case where the fund was of a small, or even of a moderate amount. The Ecclesiastical Courts labour under the imputa-

tion of so conducting their business as to exhaust the estates, the claims to which come before them, by the heavy expenses of their proceedings. It has sometimes been said that they also favour this process of exhaustion by their practice in the allowance of costs. There may very possibly be no ground whatever for the observation. But when we hear of between 10,000*l.* and 20,000*l.* as the expense of the Dyce-Sombre case, and where certainly a very large amount—probably near 10,000*l.* costs—incurred on one side, and that the losing side, has been charged upon the estate, it is natural to ask whether, if, instead of 500,000*l.* that estate had only been 20,000*l.*, the same order would have been made. Yet the same duty would have devolved upon the executor and the East-India Company, of propounding the will and prosecuting the appeal, when they were trustees for 20,000*l.*, as when they were trustees for 500,000*l.* We conceive that this case is peculiarly fitted to occasion regret for the postponement (now become almost as regular as any yearly Bill) of the measure for amending the jurisdiction and procedure of the Ecclesiastical Courts.

The next observation which arises upon this case relates to the kind of evidence which was received by the foreign authorities and professional men before whom the question of Mr. Dyce-Sombre's sanity came to be examined. The Prefect of Police at Paris instituted an inquiry upon the application of those who had the legal custody of the unfortunate lunatic, and from whom he had escaped, to have him delivered up. This being refused, in consequence of the medical evidence taken, he went to St. Petersburg and to Brussels, and obtained ample certificates of sanity from physicians and surgeons in both places. Now, it plainly appears that not one of the respectable practitioners examined, nor the Prefect himself, took any pains to inquire whether the patient's own account was true, or was intended to deceive; and none of them appears to have reflected on that of which all of them must have been aware, that a person may labour under *monomania*, and be on every subject, save one, perfectly sane; consequently quite able to converse like a rational being. All of them were satisfied with his manner and his conversation, and some of them go so far as to

express indignation at his having been placed under restraint by the authority of the highest Court in this country. That is to say, they who had only heard one side of the case were indignant that the Lord Chancellor, who had heard both, and examined other physicians, came to a different conclusion. A person of the name of Mahon is termed in the final judgment a doctor, and stated to be one of the medical gentlemen who signed the certificate at Brussels. In the court below he is not called a physician. That he is a person upon whose opinion no reliance whatever could be placed is plain, because he had entered into a bargain with Mr. Dyce-Sombre to receive 10,000*l.* upon the commission being superseded; and he exerted the utmost activity in procuring evidence with this object in view, attending at all proceedings, both in Brussels and England, while medical men and the patient himself were under examination. A Mr. Blackwood, a surgeon, is also mentioned by the judge of the Prerogative Court with not very enviable distinction, as having given a certificate of his perfect and entire capacity, although he says he had been informed by the poor man that he had seen the Lord Chancellor repeatedly, and could have had both a *superse-deas* of the commission and a divorce, if he would only bind himself to marry his lordship's daughter. The physicians at St. Petersburg do not go quite so far in their belief of his stories; but they never dreamt of questioning his statement, that, owing "to great misconduct in England, and to a bribed jury, he had been found insane." It must be admitted that the Paris physicians exhibit a very favourable contrast, perhaps with a single exception, to those of St. Petersburg and Brussels; but no one of them shows the least indication of having been aware how an insane person may be cunning enough to conceal his malady, and consequently how possible it might be so to tutor such a party that he should evade questions leading to its discovery.

This tutoring is the next matter which the case leads us to observe upon. That Mr., or Dr. Mahon, in order to gain his 10,000*l.*, not only procured medical evidence, but suggested to the patient what conduct he should pursue when under examination, is held to be clear by both Courts, certainly by the Court

below, in which the executor is conceived to have been mixed up with that individual and others in persuading the lunatic to conceal and misrepresent his opinions on subjects connected with his delusions. The Court of Review differs with the Prerogative Judge in this, holding that there is "no sufficient evidence against Mr. Prinsep, fixing him with the misconduct with which he is charged." It is said that his letters are of a very different description from those of Lord and Lady Combermere; and there can be no doubt whatever of the Court rightly so holding. The conduct of these two individuals is indeed severely to be reprobated; and a censure has been pronounced upon them in both courts, which, considering Lord C.'s station, his high rank in the army, and a distinguished place at court, and in the peerage, places him in a most painful predicament. "Exerting all his influence with Mr. Dyce-Sombre to represent himself not as he really was, but as it was most expedient that he should appear to be, to gain a given end—the superseding the commission; distinctly pointing out to him, and urgently cautioning him what he was to dissemble and conceal; urging him by every motive most dear to him to assume, without regard to truth, a given character, and carry out a deliberate scheme of deception"—such is the description given by the judgment of the Judicial Committee of the conduct of Lord Combermere; and it is justly characterized as "most culpable, tending to pervert justice, by poisoning the very sources from which justice must spring." We formerly expressed our strong opinion on the great hardship of one not a party, and therefore not protected by counsel, being exposed to attacks in the conduct of a cause. But here Lord Combermere cannot complain, for it is from his own and his wife's letters that the Court draws its conclusions, and indeed also from his examination upon oath. To what an humbling condition must a person be reduced who can thus swear—"I did say to him [Mr. Dyce-Sombre], if pressed upon the subject, Admit you were under a delusion with respect to her. He was too proud and sincere for that." His lordship had just sworn that Mr. Dyce-Sombre never ceased to believe in his wife's infidelity. The judgment, therefore, commenting on the advice thus given to prepare him for examination, proceeds: "In other words, the

deceased was advised to say what he believed to be false, to deceive the physicians appointed by the Chancellor, and consequently the Chancellor himself: the delusion was too strong to allow him to practise the intended imposition successfully."

When it is seen that under the will which Lord Combermere was by such means seeking to establish, his family took so insignificant an interest as a thousand-pound legacy, and that no further interest is alleged, at least on the face of either judgment, the inference suggested by common sense, as well as common charity, is, that this veteran warrior must be a person singularly deficient in ordinary capacity. A person like Mahon, who had been hired for a large sum, might be more easily understood in the stratagem to which he had recourse for accomplishing the purpose whereon his payment depended. But the conduct of the field-marshal can only be imputed to some confusion of mind,—some entire forgetfulness that Mr. Dyce-Sombre, whom he was tutoring, was in the position of a witness rather than a party, and that instructing him how to behave, what to disclose and what to conceal, was really not suggesting how he should conduct his case, but what evidence he should give.

The capacity of an insane person to be tutored shows that the disease is only partial. We cannot therefore easily understand the Court being so anxious to state that in the present case there is no question of this description. The judge of the Prerogative Court had dwelt on the subject of monomania, and had cited more than once the case of *Waring v. Waring*, in the Judicial Committee, reading from the judgment there given by Lord Brougham, but concurred in by all the judges, as always happens in that court.¹ That judgment is referred to as the authority both on partial insanity and on the power of insane persons to conceal their delusions. The Court of Appeal, in order to show that they differ in this respect from the Court below, say — somewhat needlessly, but also somewhat incorrectly, — "We want no books of medical science, no legal authorities, to enable us to decide this case; there is no *vezata questio* as to partial

¹ There has, during the twenty years and upwards since it was established, hardly ever been a difference of opinion.

insanity." Then it may be asked respectfully, how the lunatic was able to deceive the four physicians and the Prefect at Paris at one period, and other four physicians and the solicitor at another,—the date of the *factum*, the execution of the will? "There were doubts, and very grave doubts," says the judgment, in a subsequent passage, "as to the testamentary capacity at the period when the will and codicil were made. Men of the greatest eminence in the medical profession had expressed the strongest opinions as to his sanity; gentlemen who had been in the habit of associating with him,—persons of judgment and of unimpeachable honour, had declared the same conviction." The solicitors are then said "to have taken all the precautions in their power to guard against imposition, and were entirely satisfied that he was perfectly competent to dispose of his property, and that the dispositions which he proposed to make were the result of his own unbiassed will." All this is said to support the part of the decree overruling the Court below as to costs; and in doing it, their lordships appear to forget the lofty tone of their somewhat contemptuous repudiation of that Court's reference to their own authority,—to the decision of the Judicial Committee itself in a former case. It is not at all advisable for a Court of the last resort to cast doubt upon decided cases, more especially cases decided by itself. It is exceedingly injudicious to treat what has been determined, as *vexata questio*; a phrase which, taken in its true acceptation, implies that there has been no determination at all, although that is probably not the sense in which it is here used, any more than there is great precision and accuracy in another phrase of the judgment, *in viridi observantia*, applied not, as it always is, to a law, or a custom, or a principle, but to a person's faculties.

The two judgments are both distinguished by great ability; and they enter into every particular of the case with abundant fulness, but without the least prolixity or diffuseness to weaken the effect, whether of the statement or of the reasoning. That of the Judicial Committee is given by Dr. Lushington, but with the entire concurrence, and after the previous examination and correction of the other four judges, according to the wholesome course of proceeding in that court; and this gives rise to the

next observation which the case suggests, not an unnatural one at the present time, when the proceedings in the House of Lords have brought into general discussion the constitution of Courts of Appeal. Sir John Dodson, whose judgment was under appeal, is in the Civil Law Courts the superior judge, to whom, from Dr. Lushington, there lies an appeal in Admiralty and in Consistorial cases. It is the invariable practice in the Judicial Committee that the judge never attends the hearing of a case brought by appeal from his court. Not only he takes no part in the judgment; he does not even attend during the argument. There are conflicting opinions upon the expediency of this rule: possibly his presence might be desirable with a view to explanation, if not suggestion, as it is always held in Courts of Common Law, and even in the House of Lords. The rule, however, is established, and accordingly Sir J. Dodson could know nothing of what passed at the hearing of the cause, any more than of the deliberations of the judges of appeal upon its merits. Now the alteration of this decree proceeded upon grounds both of fact and of law; that is, of the practice which is the law of a Court. The judges of appeal differed with him upon the fact of Mr. Prinsep's conduct; and it may reasonably be held, that the conclusion drawn by five judges from the documentary and parole evidence before them, was more likely to be correct than the conclusion of a single judge from the same evidence; not to mention the fuller discussion which this question of fact had undergone upon the appeal. It is to be considered as indisputable, that the whole of the five judges gave their minds fully to the examination of this question of fact; and that the greater experience in such cases of one of their number could go for nothing in giving him more authority than the rest, because, in truth, they were all sitting like a jury upon the weight and import of the evidence. But the legal question, turning in great part upon the practice of the Civil Law Courts, stands in a different predicament. Here it is manifest that Dr. Lushington must have had greater weight than any of his brethren; and his opinion, in all likelihood, had a great influence upon the decision, overruling that of the Court below. Now, to this course of proceeding there never has any

objection been made, in all the discussions which have taken place on the subject of appellate jurisdiction. The inferior judge, from whom lies an appeal to the superior in the court below, sits in the Court of Appeal on a decree of his superior, delivers the judgment of reversal, and in directing that reversal materially influences the opinion of his brethren. Nor can it be otherwise, unless the Court of Appeal is so constituted as to exclude those who are most conversant with the subjects brought before it. The universal opinion of the Profession, as well as the suitors and the public, has been pronounced in favour of the proceedings in the Judicial Committee, which, during the controversy that has arisen respecting the House of Lords, has been held up as a model for Courts of Appeal; and yet one of the greatest objections made to the Appellate Jurisdiction of the Lords, and to the various plans suggested for its improvement, rests upon the supposed injustice, or the anomaly—indeed it has been termed the gross absurdity—of judges sitting in review of decrees pronounced by those of a superior rank in the court below. Can anything, it was asked, be more revolting than to have the decree of the Lord Chancellor reversed in a court composed in part of the Master of the Rolls, or Vice-Chancellors? Yet we see that the judgment of the Prerogative judge is overruled in the Judicial Committee by the judge from whom, in the Courts Christian, an appeal lies to that Prerogative judge. It is, however, quite impossible that it should be otherwise; because there are but two Civil Law judges, and one must sit in the Judicial Committee, with those who are strangers to the proceedings in the Ecclesiastical Courts. Possibly the suggestion which we have ventured to make of the rule excluding judges from attending at the hearing of appeals, being relaxed, may meet any evil apprehended from the circumstance on which we are commenting. There seems the less reason for abiding by that as an inflexible rule, because certainly the old course used to be for the King's Advocate, though counsel in a prize cause, to remain when parties were directed to withdraw; and he was present during the deliberation of the Lords upon the judgment which was to be given. This is the usage also in foreign courts; as in France, where the *Procureur-Général* exercises certain func-

tions that rather savour of judicial duties than those of advocacy ; and in Scotland the shadow of this seemed to be retained in the precedency of the Lord Advocate over judges, and his occupying with them the robing-room. These are no doubt the remains of powers held by the great officer in the Roman Empire, the Procurator Principis. It may probably be thought that what has been stated shows how little objection there can be to the relaxation suggested of the rule excluding the judges appealed from.

The last remark suggested by this case has reference to what has been already mentioned with another view—the amount of the property in dispute. In order to avoid all possibility of exaggeration, we only stated the costs at between 10,000*l.* and 20,000*l.*, and certainly not less than 10,000*l.* We know from the accounts repeatedly given by professional persons engaged in the cause, that the amount greatly exceeds 30,000*l.*, including no doubt the expense of the commission to the East Indies. How large a portion of the litigation has been owing to an ill-considered permission given by Lord Cottenham, that Mr. Dyce-Sombre, whom he considered a lunatic, should have the management of his property as far as regarded the expenditure of the large income, needs hardly be called to the recollection of those who have observed the effect which that permission had upon the opinion of the witnesses, especially those attesting the will at Paris. The evil effect of this order would have been comparatively trifling had the income been very moderate ; and yet its amount appears to have been a main reason for making the order. That the amount of the estate has enormously increased the expense of the proceedings, needs hardly be added ; that it entered very much into the consideration of the question of costs before both the Courts, though it operated in opposite directions, can scarcely admit of a doubt.¹ How would it have

¹ The final order giving the appellants the costs of the appeal, seems, from the language of the judgment, to betoken some little doubt, or, at least, hesitation, in the Court. One portion of it is not, indeed, very easily understood. “The respondents,” says the learned judge, “will each have their own costs out of their share of the property.” No doubt of it ; or out of whatever other property they may happen to possess, and without any order of the Court. But the appellants also were to have, and by order of the Court, “their own costs out of the share of the property” belonging to the respondents, and not out of any property belonging to themselves.

been if the estate had been only a tenth part of the value assigned to it in the judgments, and 35,000*l.* costs had been incurred ;—would all these have been charged upon the 50,000*l.*?

ART. X.—APPELLATE JUDICATURE.

WE are about to follow a very high example,—that of the Government, we might even say of the Parliament itself,—for we must postpone till our next number anything like a full discussion of this important and certainly most difficult subject, just as almost all matters of importance have been put off till the next session. There is, however, a necessity for, as it were, breaking the question, in order that the attention of the reader may be called to it in the interval, just as that of the members of the two Houses may, it is hoped, be directed to the deferred questions during the period of the long vacation. In no other way can we now pretend to deal with this subject; but we must state in what condition the late proceedings have left it.

The appellate jurisdiction of the House of Lords is of somewhat uncertain origin, and as regards the different portions of the kingdom, as well as different kinds of causes, of considerable diversity. Thus in writs of error, that is, appeals in matter appearing on the record in Courts of Common Law, it never was disputed. It was at one time denied as to appeals from Courts of Equity, and some legal antiquaries hold it to have begun in usurpation. So in Scotland, where all the estates—Lords, Commons, and Clergy—sat in one chamber, it seems agreed that there was only recourse had against the decisions of the Courts by way of protest against grievances occasioned by iniquity of the judges, and the legality of the proceeding was denied by the Courts, who sometimes punished appellants as guilty of contempt. After the Union, the right of appeal to Parliament was for some

time denied. The Lords' House, indeed, was originally constituted in a way wholly unlike what we have been accustomed to; for it had the assistance of judges and other counsellors of the Crown in hearing causes; it had even original jurisdiction as well as appellate; these assistants giving their votes as well as their advice; and their functions were general, not confined to judicial matters. But for at least a century and a half past the appellate jurisdiction of the Lords, constituted as at present, has been exercised without the least dispute in all cases, civil and criminal, from the Courts of Law and Equity in England and Ireland, though they have never had any appellate jurisdiction in matters cognizable by the Admiralty or Consistorial Courts. They have also exercised, without dispute, the appellate jurisdiction in all civil cases in Scotland. From the Channel Islands and the Isle of Man the appeal lies to the King in Council, as it also lies from the foreign dominions of the Crown, and from the Admiralty and Consistorial Courts.

Now it is as little a matter of question or of doubt, that this most important jurisdiction has been exercised by the Lords during the whole of the long period to which we have referred, with universal approval; that although objections have occasionally been offered to some of the arrangements made with a view to the despatch of the business, and complaints have sometimes been heard of the delays occasioned by its increase, and defects have been stated, as the want of judges educated at the Scotch Bar, or of those who in Ireland are conversant with the habits of the people and the management of property; yet, as a whole, and generally speaking, the Lords have given great satisfaction in the exercise of their judicial functions.

Accidental circumstances at different times gave rise to criticism, and a temporary dissatisfaction was experienced. Thus, Lord Eldon's illness having occasioned an arrear in the business, he sometimes was replaced by a deputy-speaker not a member of the House; afterwards, Lord Gifford, first when Chief Justice of the Common Pleas, and then when Master of the Rolls, supplied his place, and gave general and entire satisfaction. The rules of the House require the presence of

three peers to make a quorum,—of seven in committees. Lord Eldon therefore made an arrangement which has been the subject of great remark, and indeed invective, that two lay peers in rotation should attend, in order to make sure of a quorum; and no doubt their taking part in the business was merely nominal and apparent; for different lay peers might attend on the hearing of any case that lasted more than one day, and the decision might be given when none of them were present who had attended the hearing. It would, perhaps, have been better to rescind the standing order as to a quorum, though all men being aware that none but the law lords took any part in the judicial business, no one was deceived by the device which had been fallen upon; and it may be added, that the abuse lavished upon it was never extended to the Committee of Privileges, where precisely the same consequences may, and often do, result from the exigency of seven, as in the House from requiring three to be present. But the important consideration is, that the conduct of the business, and its despatch, generally gave entire satisfaction; that the causes were heard, and their merits examined, and judgments given, by men whose capacity, learning, and integrity never were questioned, and who spared no pains thoroughly to sift the merits of each case.

We have said that at different times complaints were heard, and it might be incorrect to affirm that for these there never was any solid foundation. One Chancellor might be too dilatory; another might be too hasty: one might be too anxious, and encourage prolixity at the Bar; another too impatient of discussion and repetition. The difference of various capacities was undeniable; and there could not always be a Hardwicke or a Mansfield on the woolsack. Erroneous judgments might be given, both by mistake in law and in fact; and for the moment discontent might prevail both in the Profession and in the public. But as no human tribunal can pretend to an exemption from error, as no procedure, how wisely soever it may be devised, can secure a Court from miscarriage, and the suitor from injustice; it may be safely affirmed that the Lords exercised their office with as little ground for complaint as any of the other great Courts in the empire, and that evils and

inconveniences occasionally experienced were in their nature accidental, and of temporary duration.

An inconvenience of the same description, in the session of 1855, seems to have given rise to the late complaints, and the measures devised for meeting them. For some weeks, only two law lords—the Lord Chancellor and Lord St. Leonards—sat to hear causes; and upon three or four of these they could not agree. Instead of directing a second argument, by one counsel on a side, with the attendance of some third law lord, which is the practice in the House of Lords, as well as in the Judicial Committee, they proceeded to a decision; and as the rule of the House in an equality of votes is *præsumitur pro negante*, in each case there was an affirmance. This, of course, gave great discontent to the appellant, and it also produced an impression that there had been no decision at all in these cases. The answer to this no doubt was, that as the judgment in the Court below must be presumed right until the contrary is shown, so there were here two opinions against one, and a right result had been arrived at. Nevertheless it must be admitted that the circumstance was unfortunate, and that the accident of it occurring so often within a week or two had an inevitable tendency to create comment and excite discontent. It was further observed, that of late years there had been much greater difference, not only of opinion among the law lords, but of reasons assigned for opinions in which they all agreed. There was more of debating, it was thought, than there had formerly been in the judicial proceedings of the House; and this was by some supposed to affect the authority of the decisions, by others to encourage appeals, by many to create heartburnings among the parties, if not among their counsel. By listening to such complaints, which, indeed, found a vent in the House of Commons, and to a certain degree had been taken notice of in the House of Lords itself, the Government was induced to apply a remedy without due consideration, which would have shown that the inconvenience complained of was temporary, and could easily have been removed by arrangements among the law lords themselves. The creation of Baron Parke as a peer for life was resolved upon; and as in his case an

hereditary peerage would have had precisely the same consequences, he having no son, this step was a plain indication of the resolution to create more life peers; and so great an innovation at once and inevitably occasioned serious opposition in the House of Lords.

Into the merits of that question we need not now enter. Whether viewed upon the grounds of constitutional principle and expediency, or of strict legality, the Lords, after ample discussion, have, by decisive and increasing majorities, decided against such peerages; that is to say, they have decided, as far as they had a right to entertain the question, not only how far peers created otherwise than by an hereditary tenure can sit in the House, but how far, even if the prerogative extends to granting life peerages with a right to sit, such grants are consistent with the spirit of the Constitution, and ought in any case to be made. Both questions have been decided in the negative. At first there was considerable hesitation upon the first point among three law lords who were clear upon the second. Lords Lyndhurst, Brougham, and Campbell, either doubted on the illegality, or even inclined against it; led away like many of the Profession, both text-writers and others, by the supposed authority of a passage in *Co. Lit.*, which never had been carefully examined. Lord St. Leonards had no doubt at all that the creation was illegal; but his opinion had, perhaps, the less weight because of his denial that the illegality could be doubted, when certainly there existed opinions and some authority against him. However, the point of law must now be taken to be decided by the authority of the House, with the concurrence of all the law lords save one—the Lord Chancellor, who had plainly been led away by the passage referred to (as Mr. Baron Parke himself appears to have been), and who had not taken the precaution of desiring the opinion of the law officers,—a course usual in all important cases where the least doubt can exist,—and which, though not binding on the Government, is most expedient in order to prevent mistakes. It turned out that in this case the opinions of those learned persons were against the legality of life peerages.¹

¹ It was unfortunate, perhaps, that Lord Wensleydale should have

What followed is exceedingly to be lamented. The leaders of the Conservative party took the question out of the hands of the law lords into their own; they at once adopted all the complaints which had been made of the appellate judicature. The Government had by the life creation, and the arguments urged in its favour, seemed to admit—but seemed a good deal more than they really did admit—the existence of some ground for those complaints. They appeared to allow that an increase of judicial force was required; but the Conservative chiefs went far beyond this. They inveighed against the arrangements respecting the quorum; they declared that the Chancellor sitting to hear appeals against his own decrees was greatly to be regretted, if not reprobated; they dwelt upon the unfortunate accidents of an equal division among the peers who decided the cause; they adopted the position so hastily put forward, that the mode of conducting appeal business was unsatisfactory, and above all, that in Scotland it gave great discontent to both the Profession and the public. They therefore proposed that a Select Committee should inquire into the whole matter: that committee was named, omitting some who had taken a forward and important part in the debates; and it proceeded to examine five English barristers, two belonging to both English and Scotch Bar, one Irish barrister, two Scotch judges, and two English equity judges.

It is impossible not to perceive that there was in this proceeding a great desire of expediting the business, and that to this predominance of haste over good speed it was owing that a much more searching investigation did not take place. To give but a few examples of great and manifest omissions. Not a single attorney or solicitor was examined, either from

reserved his petition for the Commons, and not taken steps for raising the question of law before the Lords, in such a form as to bring it before the judges, and have it argued in the usual manner, as the *Fermoy* case has since been argued and decided. His lordship's argument on the force of the writ of summons we consider would have availed him little, though it appears to have weighed with some members of the House of Commons. The writ taken by itself must undoubtedly have enabled him to sit; but, when coupled with the patent, it was as a writ calling upon him to sit for life, and could no more have been effectual for that purpose than a writ calling upon him to sit for a day, or to sit during the pleasure of the Crown, could have given him a right to sit on these terms.

England, Scotland, or Ireland; not one of those who in London conduct the Scotch appeal business, which was made the main ground of the dissatisfaction supposed by the Conservatives to be felt with the appellate judicature. Then there was hardly any inquiry as to the public opinion or feeling in either kingdom. Again, there was constant reference made to the Judicial Committee, and the new arrangement of the Privy Council law business by Lord Brougham's measures of 1833 and 1834; and the argument in both Houses, as well as out of doors, has very mainly turned upon that Court being so satisfactory, and on the expediency of either taking it as a model for the improved procedure, possibly the changed constitution of the Lords' Appellate Court, or of transferring to it their judicial duties. Yet not a single witness was called from the Privy Council Office, and the most glaring mistakes were committed with respect to the proceedings there. But the entire discrepancy in the opinions of those persons who were examined, made further testimony still more absolutely necessary. The English counsel are, on almost every matter both of fact and opinion, whether as to the existing state of things or the changes to be recommended, in diametrical opposition to one another. The English judges differ hardly less widely. The Scotch barrister has no material support from either of the Scotch Chief Judges; and those chiefs differ as widely one from the other as it is possible for men to do, who are either stating facts, or giving opinions upon the same subject-matter.

But the political chiefs on both sides had resolved that something should be done; and they prepared a plan which, never having been expounded, much less defended, by its authors, has met with as universal an opposition, both in the country and in the only House that ever took the trouble to consider it, as any project of legislation of which our parliamentary history furnishes an example. Among its many defects, we may truly say that want of simplicity is not one; for nothing can well be imagined more simple, or anything more absurd. It is to make two Deputy-Speakers, what may be called journeymen Chancellors, with 6,000*l.* a year salary, and all the privileges of peerage, whether they be hereditary or life peers,—and to require

that they should have held high judicial offices for five years. The power of creating life peers is restrained to four. A very able and learned article in the last number of the *Edinburgh Review* exposes in the most unsparing terms, but by irrefragable argument, the absurdity of this plan, this master-piece of the legislative wisdom of the Conservative party; for theirs it is, as theirs (strange to tell) was the movement against the House of Lords; and the Government appeared rather to acquiesce in it than to patronize it. The article to which we refer merits the most attentive consideration; for though we may find it impossible to concur in all the recommendations which it contains of a remedy for evils of which, with the author of the article, we greatly doubt the existence,—certainly to the extent alleged,—yet the objections to the plan proposed by the late Bill—as since its virtual rejection by the Commons we may call it—are altogether unanswerable.

“It is open,” says the article, “to every species of objection. These judicial officers will constitute a sort of triplicate of the Chancellor, who, having already obtained the assistance of two lords justices in his own court, is now to have two other deputies in the House of Peers. As, however, they are to have political votes, and to be appointed, in fact, by the Chancellor himself, it is not unreasonable to apprehend that they will be chosen, at least in times when party runs high, as much for their political sympathies as for their judicial eminence. But, in reality, they will bid fair to become in the House of Lords more powerful than the Chancellor himself; for they are to be permanent, and he is ephemeral; and in the event of a ministerial change, the new Chancellor—perhaps altogether new to the Bench—might find himself sitting between two political opponents.”

The next objection is to the introduction of peers paid by stipend among others who are only remunerated by rank; and on these paid peers the duty will no doubt be cast, because they are paid. The salary is there stated to be enormous,—6,000*l.* a year for sitting two, certainly not three, months in the year, as is shown by a reference to the returns of the number of days during which the House sits on judicial business. These men are

to have, says the *Review*, 300*l.* a day, or about 400*l.* for every cause. Yet a large salary is an indispensable part of the scheme, for without it you could not get judges to resign such offices as would best qualify them for the new places. The evil of withdrawing the ablest judges, and confining them to the Court of Appeal, and the certainty that this transfer will impair their judicial capacity, is next stated. Then no provision is made for Scotch cases, the decision of which by English lawyers was the main ground of moving for the inquiry; and these cases are stated to form two-thirds of the whole appeals. No notice is taken (which surprises us) of the most serious constitutional objection,—the holding out such places of enormous emolument, high dignity, and very little labour, as a temptation to the puisne judges, which in such times as we have lived through might have the most dangerous tendency, but at all times is carefully to be avoided. But one other objection we find in which we entirely agree, and it is of great importance,—indeed of itself would, we think, be decisive against the plan. “We see no advantage,” says the *Review*, “in adding two legal peers to the House of Lords, for very obvious reasons, but more especially for this:—On all questions affecting the reform of the law, they will, when combined with the Chancellor of the day, exercise a preponderating power over the legislative deliberations of the House, and when in opposition to him, they will offer a most formidable impediment to the policy of the Government. To express the same idea in other terms,—the Chancellor multiplied by three would be too strong—divided by two, he would be too weak.”

We have deemed it not superfluous to state the objections to the scheme, although it has for the present been rejected by the general concurrence of all whose opinion was of value, both in and out of Parliament, because there was extraordinary zeal and activity shown by its authors—certain Conservative leaders—to obtain the assent of the Commons, and the attempt may be repeated next session. During the interval, it is to be hoped that great attention will be given to the subject, and that the evidence taken in the Lords’ Committee, as well as what passed in both Houses, will be fully considered. It is

with a view to help this consideration, that we have thrown together these observations; and with the same view we shall proceed to add some remarks upon that evidence and those proceedings.

It has been asked, why, if the statements respecting the Lords' conduct of judicial business are so much exposed to the charge of exaggeration, the law lords did not offer a peremptory denial, and defend the House? The answer is obvious: they were placed in a peculiarly delicate position; because the charge, though made against the system, might be conceived to implicate the individuals. It should seem, therefore, that they allowed the objectors to do as they pleased, and let them call whatever witnesses they chose, to impugn the judicature. Accordingly, different barristers who had causes decided against them were examined, and complained of the Court. In one or two instances, indeed, facts having been mis-stated, some of the law lords thought it necessary to give a contradiction; but in general they allowed the whole discontent of the Profession to find a vent unobstructed. And after all, it really appears that there is very much more in favour of the House than against it, when the depositions of the witnesses come to be examined. If there were anything like ground for the dissatisfaction which some, both in the Profession and in the House of Lords, described, such testimony never could have been borne to its proceedings as we find both from barristers and judges. Mr. Rolt says (p. 69), that he has been engaged in continual practice before the House for the last twelve years; that the business "has been admirably conducted; and though some regulation might be made to improve the practical working, it must be such as did not prevent the House retaining its jurisdiction, which he considers of great importance to the administration of justice." He adds, that the "law of both England and Scotland has been wisely and impartially administered." Further on he says, "The losing party is never satisfied, but generally suitors have been as well satisfied—I think I may say more satisfied—with the decisions of the House of Lords than any other tribunal I have ever practised before." The Master of the Rolls (p. 159) speaks of the "great disposition

to exaggerate the defects in the proceedings;" and these defects he regards as those which could be easily removed by order of the House itself. The only other English judge examined, Vice-Chancellor Stuart, himself a Scotchman as well as an English lawyer, declares (p. 172) that the conduct of judicial business in the Lords "has been in the highest degree satisfactory;" that he considered no tribunal more entitled to the respect of the public and the suitors; or that, as far as his observation goes, "has more completely obtained it." He adds that in discussing the subject with objectors, he always found that their objections turned on accidental circumstances. Being asked if his statement applies to Scotland as well as England, he says, "certainly, in Scotland it has been in the highest degree satisfactory." He gives a clear opinion against having a Scotch lawyer a member of the Court of Appeal, and adds, that this was also the opinion of Lord Corehouse, Lord Jeffrey, and Lord Rutherford. The Lord Justice Clerk (Hope) considers that it has "worked admirably for 150 years" (p. 145), and explains the cases said to have been erroneously decided from ignorance of Scotch law; stating that the House was generally right, and where it may be supposed to have gone wrong, it had the authority in its favour of the most eminent Scotch lawyers, as well as text-writers. His lordship "most earnestly deprecates any alteration in the composition" of the House on hearing appeals.

Even the Lord Advocate, who is strongly in favour of a Scotch law lord, pronounces the highest panegyric on such of the judgments as he refers to, of Lord Cottenham, Lord Brougham, and others. He is for the revival of the office of Chancellor, which he regards as an important prize for the encouragement of the Bar; and the Dean of Faculty holds, that to make the Court good for performing its office, it should consist of a Chancery and Common-Law lawyer, a Scotch lawyer, and an eminent civilian from Doctors' Commons. So that, according to this learned gentleman, a civilian should receive a large salary and a peerage, in order to sit once in two years, or at the most once a year; there being no greater number of cases before the Lords in which any portion of the Civil Law can come in ques-

tion. The account which he gives of the errors in the Scotch law is very different from the statement of others; and his notion that there were great changes effected by the decisions of the House of Lords is, we find, at variance with the opinion of Scotch lawyers. Of course upon this subject we cannot have any knowledge; but those who do possess it have given us a very different account of the matter from the learned Dean's; and when we observe the decisive answer given by the Lord Justice Clerk to some of the statements respecting the decisions in the Lords; when we observe the strong opinion of Mr. Anderson, Mr. Ker, and others, on the extremely satisfactory proceedings in the appellate judicature, and remark the examples given by Mr. Anderson, and by the Lord Advocate himself, of the manner in which the Lords have preserved the Scotch law, by correcting errors committed in the Scotch courts; when we note what the Lord Justice Clerk says on the supposed errors committed on the appeals,—we are led to the conclusion that the alleged want of a Scotch law lord proceeds from the prejudice of professional men in favour of the proposed new office. It must be added, that Mr. Napier bears ample testimony to the manner in which a conscientious and painstaking judge of appeal will overcome the difficulty raised by having a law to administer with which he is at first not conversant. Lord Truro was wholly unacquainted with the Irish Registry Law; but he sedulously examined the matter, without any assistance except the books, and delivered, says Mr. Napier, “a very able and elaborate judgment, and a very satisfactory one” (p. 115).

That some of the English barristers examined join, to a certain extent, in the complaints, and are profuse in their proposal of remedies, is true; but without intending the least disrespect to those learned persons, or meaning to state that their professional feeling—their fellow-feeling with the Bar—causes them to exaggerate the evil for the sake of the remedy, we conceive that, unknown to themselves, this gives a bias to their opinions, the rather when we observe the very liberal scale on which they propose that provision should be made to meet the evil, or inconvenience, suggested; just as the head of the Scotch Bar faithfully represents the feelings of his brethren and con-

stituents, when he says, rather than have the appellate jurisdiction vested, not in a single judge, or in a Court partly composed of Scotch lawyers, but in one of English lawyers, he should prefer passing an Act at once to abolish the whole law of Scotland, as the lesser evil of the two (p. 126). The English lawyers who have been adverted to as proposing such ample creation of places, recommend a Court composed of five,—that is, four with the Chancellor; and a salary of not less than 8,000*l.* is proposed for them, with two or three months' work in the year, and all the honours of the peerage. Another proposal is, that they should only have 5,000*l.*; but the Government felt the inconsistency of this sum with the emoluments of the chiefs, and consented to 6,000*l.* as the least that could be allotted. It is in vain to deny that the professional feeling must bias men's opinions, when the question arises of so amply increasing the endowments of the body they belong to. It is not their own personal interest that operates, either directly or indirectly, on those able, learned, and honourable persons, to whom, indeed, the matter may be indifferent, as they may be looking higher, or in other directions: it is the *esprit de corps* to which we refer.

When the scheme came before the Commons, great stress was laid upon the admirable working of the Judicial Committee, as indeed it is much dwelt upon in various quarters,—in none more than in the celebrated periodical work which we have cited. A most learned and distinguished civilian (Dr. Phillimore), among others, made this reference, and he considered that Lord Brougham's Bill of 1834, extending the jurisdiction of the Committee established by him in 1833, might have been made the groundwork of the present measure. But, agreeing in all the comments bestowed by Dr. Phillimore and others on that tribunal, we must remark that its author never after 1834 renewed the proposal, which might have led to a transfer from the Lords of their appellate jurisdiction; but which, if it had been constantly acted on, must have required a new arrangement of the Judicial Committee; for its sittings are only forty a year, those of the Lords from sixty to seventy on an average;

consequently, there must additional force be given, in order that the Committee may be able to perform its new duties without taking the judges from their courts. And this leads us to the difficulty by which we are met at the very outset of any plan for the establishment of an appellate tribunal,—a difficulty in some sort insuperable. If the judges are confined to their appeal functions, and do not sit continually in other courts, they become less capable after a short time, and they are also ignorant of much that happens to modify, if not change, the law, especially in points of practice. If, on the other hand, you take them from the other courts, the business of those courts is necessarily interrupted. The only fact which the evidence discloses to show a way out of this dilemma, is the agreement of the different witnesses in representing the most perfect state of the Appellate Court to have been when it was composed of ex-Chancellors, with the Chancellor of the day occasionally, and but rarely, attending; for when Lords Brougham, Cottenham, and Campbell formed the Court, Lord Lyndhurst appears to have rarely attended (pp. 3, 19).

The reference to the Judicial Committee affords another instance of the little attention given to the questions that have been raised, possibly of the ignorance respecting the subject, of those who have undertaken to handle them. One of the main objections to the appellate jurisdiction is that attendance is voluntary; another objection is, that the same judges do not always sit; a third is, that no one can tell in any case before whom it is to be heard. Now, to every one of these objections the Judicial Committee is exposed, and yet it is held to be the very model of an Appeal Court. So of the trivial matter of dress, great discontent is expressed by some of the witnesses, as it was in debate, with the Lords attending in no official habit. Now, in the Judicial Committee there never has been any such dress whatever. In another and a much more important particular, no doubt that Court is justly held up as an example to the Lords. All the judgments are considered and settled in private, and are pronounced without any discussion among the judges. A difference of opinion very rarely, it is said, occurs;

and when it does, though sometimes the judgment may be mentioned to be that of the majority, no reasons are ever given by the dissentient minority.

It is remarkable enough that in all the discussions which took place among the Commons (among the Peers there was little or none), with all the liberality shown, on the one hand, in providing ample salaries for enabling the Lords to continue their judicial office, and with all the denial, on the other hand, that such succour had become necessary, no reference was ever made to the gratuitous services whereby the exercise of their appellate functions had for so many years been rendered possible. A general impression prevails that a Court consisting of a single judge is unfit for revising the judgments of two, or three, possibly more, judges in the courts below. Of late years, therefore, the Lords have had from persons no longer in office the benefit of continual and laborious attendance. Lord Brougham, ever since 1834; Lord Cottenham, while out of office from 1841 to 1846; Lord Campbell, from 1841 till he became Chief Justice in 1850; Lord St. Leonards, since he quitted office in 1852; Lord Truro, until disabled by the illness which proved fatal,—all attended as regularly and worked as unremittingly as any of the judges in their own courts; Lord Lyndhurst came occasionally, too, when his assistance was wanted, though out of office. Those noble lords—all but one—no doubt had their retiring pensions; but these pensions were never intended as salary for duties when the holders had quitted the great seal; they were a compensation—and a small compensation—for the risk and the loss incurred by quitting their practice at the Bar. Lord Campbell, however, from 1841 to 1846, had neither official salary nor pension, and his attendance was unremitting. It might have been deemed natural for those who were proposing 12,000*l.* or 24,000*l.* a year, still more for those who proposed 32,000*l.* to endow a new Court, to reflect on the sums of 264,000*l.*, 528,000*l.* on the one plan, and 704,000*l.* on the other scheme, for saving which the country was indebted to the gratuitous services freely volunteered and faithfully rendered by those law lords. We put their work and labour only at its money value, the lowest and most vulgar kind of estimate; but

they must be admitted to have done far more service in precluding the necessity of perilous experiments on the Constitution, and enabling the judicial system to be preserved entire, which had given so much satisfaction for so many long years. Yet of their voluntary services not the faintest whisper in the nature of acknowledgment was heard in any quarter. On the contrary, while one side repudiated them as worthless because unpaid, others were disposed to carp at the individuals, to charge one with having decided none of the causes he had heard (which proves a gross misstatement, as Lord Truro left but a single case undecided), and to hold up the manner and action of another in giving his opinion, as one of the reasons for requiring a change.¹

A somewhat extraordinary reference to the Judicial Committee was made by Mr. L. Wigram, clearly indicating how unsafe a guide a practising barrister may be in leading our opinion as to the proceedings of Courts, and the conduct of judges. He joined in the praises which have so generally, though sometimes with peculiar objects in view, been lavished upon that tribunal; but he confined his commendations to its proceedings at present and of late years, observing, that it gave no satisfaction for some time after it was established. Having the greatest suspicion, from all that others had said, that this statement could not be correct, we examined the returns of the attendances in the Committee for the first twelve years, that is, from 1834 to 1845, both inclusive. It appears that during the first eight years (and to these the assertion must apply) the Committee was regularly attended by Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine. Can any one descry the very least ground of objection to those able and learned judges, except that they were Common-Law lawyers, and that Mr. Wigram belongs to the Court of Chancery? But the Vice-Chancellor of England (Sir L. Shadwell) appears to have attended repeatedly during those eight years,—in one year thirty-six days, in another, twenty. On all probably of those days when he attended, there were

¹ The returns for the last nine sessions show Lord Brougham's attendances to have been 573 days; Lord Cottenham's, 282 out of office, 280 when Chancellor. In fifteen sessions the former lord had attended 970 days.

appeals from the Equity jurisdiction in the colonies. But Mr. Wigram gives as the ground of the satisfaction afforded of late years, not only that three Equity lawyers attended, but that Dr. Lushington was there also. Then the same return shows that this learned and able judge attended regularly during the last four of the eight years to which we are referring. Consequently Mr. Wigram is in this dilemma; either Dr. Lushington is not the cause of the satisfaction stated as of recent date, or the observation refers to the first four years only after the Court was established; but then the objector falls into another difficulty; for Sir L. Shadwell attended the first three of these four years, as well as Judges Parke, Bosanquet, and Erskine. Nothing can show more strikingly than this how dangerous it is to be guided by the opinions, and, indeed by the statements, of barristers in estimating the merits of judges.

We commenced this article with announcing that it was to be taken as a help to those who might during the ensuing recess of Parliament direct their attention to the whole of the great and difficult question touching the formation of a Court of Appeal; we may add also to the important, but much less difficult inquiry, how far the accounts propagated, from various motives and very different designs, respecting the judicial conduct of the House of Lords, are well founded. The probability is, that their great exaggeration in some particulars will be found sufficiently proved; that the important errors both of fact and of law which have been introduced into the discussion will be made manifest; that little change will be deemed requisite beyond what the House itself could introduce without any alteration of its constitution; and that the Government will lose no time in retracing its steps by giving an hereditary peerage to one learned and now noble person, possibly increasing in the same way by the aid of others the judicial force of the upper and hereditary chamber.¹

¹ We have referred to the able paper in the *Edinburgh Review*, as conducing materially to bring about the condign fate of the scheme. The most powerful assistance was also rendered to the same just cause by the vigorous and decisive, though perfectly temperate arguments, so judiciously and seasonably urged in the *Times* newspaper. Nor can we omit to mention the learned tract of Mr. G. Brodie, the most remarkable that the controversy has produced.

ART. XI.—DUNN'S CASE.

IT has sometimes been said, that there is one law for the rich, another for the poor, regard being had rather perhaps to the costs of legal proceedings than to the administration of justice. But there seems to be one course of procedure, if not one kind of justice, for the highest class, not extending to the rest of the community, how exalted soever in either rank or fortune. The late proceedings in the case of Dunn appear to show this, and to point out the necessity of some such improvement as shall prevent any person, as well as any royal person, from suffering what Miss Burdett-Coutts had for so many years to endure. This man, a barrister, was seized with an ungovernable desire to possess the fortune of that amiable and excellent person; whose charities are as extensively as they are judiciously distributed. He announced himself only to be in pursuit of her hand, having not the very slightest acquaintance with her, and he persecuted her with letters, as well as attempts at obtaining an interview. Whether he was from the first of unsound mind may be a doubtful question; that he was not so believed to be is plain, because he was tried and convicted of perjury, and suffered imprisonment on that sentence. His liberation was followed by an immediate renewal of his proceedings, sometimes pretending to be a favoured suitor of a person he had never exchanged words with; sometimes making oath that she set persons to waylay him; now declaring that she owed him enormous sums of money; now insisting upon her seeing him, or writing to him; always avoiding any breach of the peace, yet always making it impossible for the object of his manœuvres to stir abroad either in town or country without being exposed to his impertinences. That he was at the first an Irish fortune-hunter, with the impudent pretensions of being certain to win any person's favour whom he might please to address, is unquestionable, and he might begin by being only intoxicated with vanity, nearly, though not quite, amounting to disease. But the intense anxiety for

obtaining possession of vast wealth had disordered his mind, if it was not originally diseased; and no one who considers his whole conduct can doubt that, had he been examined by medical men, a report would have been made of his insanity. Unfortunately this was never done, and his system of unceasing annoyance continued for nine or ten years, without the least control, or any protection to its victim.

Very lately he has not perhaps transferred, but divided, his attentions, by pursuing the same course of annoyance to the Princess Mary of Cambridge. The police magistrate most properly ordered him to be examined by two eminent physicians, who reported that they had no doubt whatever of his labouring under the delusions of an unsound mind, and that his being left at large was dangerous to both himself and others. An expression which dropped from him, and which he had never used in respect of Miss Burdett-Coutts, was the ground of the opinion that his own life was in danger from his malady. But his declaration of belief that the Princess, and indeed the Queen also, were fond of him, was only a repetition in terms of what, in the former case, he had plainly indicated by his whole conduct, as well as less distinctly by his expressions; and no one can have the least doubt that an examination would have satisfied the physicians of his diseased state. Yet he was repeatedly described by friends, countrymen of his own, as a person of respectability and of talents.

It is impossible to deny that cases of this description are attended with no small difficulty when brought before magistrates, and that the greatest care must be taken to avoid the requiring sureties of the peace from persons unable to produce those who are ready to answer for their good behaviour, because this might inflict endless imprisonment upon those whose misfortune it was to have no friends. It is also to be considered that even medical evidence may not always afford a sufficient ground of such a sentence. There are, however, cases of such manifest insanity that detaining the persons complained of until a more formal and complete investigation may be instituted, could produce no possible injustice. Possibly a check might be provided against abuse by requiring a further inquiry

after a certain period of detention. As the law now stands, if a person is committed for want of sureties of the peace, there seems no limit to his imprisonment, and this would be more objectionable when the commitment had originated in no outrageous act, and no threat of such violence. We need not discuss fully the limits of the question ; on these differences of opinion may exist ; but on one point there can be no doubt. That which is deemed sufficient to authorize detention in the case of one class of complainants must be held sufficient in the case of all classes. It is wholly absurd to hold that the oath of one person, that she has been threatened with personal violence, or that for any reason she considers herself in danger of it, should be required before she can be relieved from being infested by conduct which makes her whole life one continued suffering and alarm, while another, because a princess, is, without making any oath at all, at once protected by those who know of annoying acts satisfying the magistrates of the offender's insanity, without the party against whom these acts were directed ever deposing to having been annoyed.

ART. XII.—DIVORCE BILL.—COUNTY COURTS.—
LATE SESSION.

OF the complaints urged, and justly urged, by all friends to the amendment of the law against the shortcomings of the late session, the most prominent are those touching the Divorce and the County Courts Bills,—the postponement of the former, and the mutilation of the latter. It has been a cruel disappointment to find that when the Lords had, almost beyond the hopes of the advocates of improvement in the law, adopted a measure of importance, as more than a beginning of putting the law of divorce upon a rational and consistent footing, this measure should be sacrificed to the desire of saving a day or two, perhaps an hour or two, and by so much preventing the prorogation ; for no one entertains the least doubt that it might,

without any serious opposition, have been passed through the Commons. We consider the Government as greatly to be blamed for this; and unwilling as we are, and have ever shown ourselves, to think ill of them, we must freely admit that the censures on all hands pronounced upon their conduct must be joined in by the friends of law amendment. No less heartily, and far more cheerfully, will they join in awarding thanks to Lord Lyndhurst for his invaluable assistance to the great cause of law amendment on this as on so many other occasions. The committee which so altered the Bill as to give it all, or nearly all, the great merit which it possessed, was appointed on his motion; its deliberations were conducted by him; the changes introduced were explained and defended in his able and truly memorable speech; and the Bill, though not in his name, was really his measure. Its postponement must by him be deeply lamented; but that he will early next session introduce it again, we cannot doubt, and we feel assured that it must then be carried.

The County Courts Act has passed, but with important defects. Of these we shall specify only one,—the restricting the salaries to 1,200*l.*, after Parliament had with a wise liberality granted 1,500*l.* Sir J. Pakington's motion for the latter sum was rejected, not because the ministers feebly opposed it, but because the local influence of the inferior officers in those courts occasioned a great support from the borough members to the clause proposed in their favour, and which was carried against the Government. Those borough members would not vote for doing justice to the judges, because they reserved themselves for the question in favour of the subordinate officers; and it is a fact well understood, that the Government expected to be defeated on the judges' salaries, and were not indisposed, it is confidently affirmed, to that result. The consequence of the restricted salary will be the keeping down the remuneration of the judges while their labours are increased; for it is certain that the provisions of the Act will tend to increase very considerably the number of suits brought in those courts.

Many of these provisions are great improvements; but one is of greater value than all the rest, and its tendency will certainly

be to facilitate and thus to increase the proceedings in those courts. A large proportion of the fees, that is the taxes, levied upon the suitors for the expenses of the courts is at length, and after a struggle of several years, removed; no less than 170,000*l.* of these burthens are now taken away; and after all men had agreed, both in and out of office, that they were intolerable, that not a word was to be urged in their behalf, to the universal astonishment, Mr. Gladstone came forward as their champion, and actually moved an amendment, to the effect of levying the expenses of the courts upon the suitors, and relieving the rest of the community from their share in the expense of administering civil justice to somewhere about ninety-nine in a hundred of all the parties to all the cases in the country.

It is now seventy years since Mr. Bentham published his celebrated "*Protest against Law Taxes*;" and above half a century since his argument was pronounced a complete demonstration by Mr. Windham and other enemies of all violent change, nay even of many improvements which might be required as safe and temperate, but to which they were averse from their habitual dread of innovation. Yet they, including Dr. Laurence, the friend and executor of Mr. Burke, supported the motions made in 1804 against increasing some law taxes, and their support was avowedly grounded on the arguments of Mr. Bentham, whose work was referred to by them, and the difficulty of procuring it especially lamented by Mr. Windham, who joined that great amender of the law in ridiculing the fallacy of maintaining such imposts, in order to check excessive litigation. Half a century has since passed away, and Mr. Gladstone appears as the believer in that absurd fallacy; he is afraid of making law, that is, justice, too cheap. To show how little he has considered the question, we need but to mention the main argument on which he relied—that as one of the parties must be in the wrong, he should pay for the expenses which he has occasioned to the other. But does not Mr. Gladstone know that the tax is paid in the first instance by both parties, before it can possibly be known which is in the wrong; and that, though the sentence condemns the loser to pay, if, as constantly happens, he has not wherewithal to pay, the winner, that is the party

found by the judgment to be in the right, has to pay out of his own pocket. But we should be ashamed to enter into this question in the middle of the nineteenth century. As often as the complaint was made in the House of Lords by Lord Brougham year after year, that the judges of the Superior Courts were paid by the country, and those of the Courts where the poorer classes were the suitors, and where the great bulk of the causes were tried, fell upon the suitors themselves, there was an universal admission that this intolerable anomaly, this grievous injustice, could not possibly be any longer endured, and that it must be got rid of as speedily as possible. The delay was much complained of, but the report of the County Courts Commission was expected, and till it was made no steps were taken. It came at length, and the Bill, in redemption of pledges so often given to the founder of these Courts, was at length presented. It passed the Lords without the least opposition to that, its most important provision; and Mr. Gladstone alone objected to it in the Commons. But he did not venture to divide. That he should also oppose Sir J. Pakington's motion could after this excite little wonder. Indeed, his opposition might be deemed consistent with his opinion against making justice cheap; for as maintaining the tax upon suitors would have had a direct tendency to obstruct the access to the Court, Mr. Gladstone might contend against giving the judge an increased salary, when his motion went to prevent an increase of his business.¹

¹ Mr. Windham's complaint of the difficulty of obtaining Mr. Bentham's work has lately been met by a republication of it by a member of the Law Amendment Society (we believe Mr. J. Parkes). It is inscribed to Lord Brougham as the President, and also as having so constantly urged the relief of the County Court suitor, upon the principles of the "Protest against Law Taxes." The editor, to his able observations, has very judiciously added extracts from the debate in 1804, in which Mr. Windham, Dr. Lawrence, Mr. Serjeant Best, and Mr. Fonblanque, as well as Mr. Sheridan, took a part. The pamphlet was published by Ridgway in 1853.

ART. XIII. — PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

I. REPORT OF THE PERSONAL LAWS COMMITTEE ON THE LAW RELATING TO THE PROPERTY OF MARRIED WOMEN.

YOUR Committee have considered the valuable paper of Mr. Serjeant Woolrych, referred to them by the Society, and have carefully inquired into the state of the law of property as it affects married women, both in its administration by Courts of Law and by Courts of Equity; they have also examined the legislation of other European countries and of the United States of America on the subject; and they have agreed upon the following Report.

In order to understand fully the anomalous character of the Common Law of England as it bears on the property of married women, it is necessary to take a retrospective view of the history and growth of those rules on the subject which distinguish our law from that of other civilized nations.

The rules which regulate the enjoyment of property by married women in Europe are clearly traceable to two distinct sources, Rome and Germany. Those nations,

Marriage Law and Rules as to Property derived from Rome and Germany.

though under very different conditions of civilization, were probably the first in the ancient world to place the institution of marriage on its proper basis, namely, the perpetual consort of one man with one woman for life, both parties having common interests, and equal rights, dealt out to them by law. The Greeks, retaining or imitating the customs of the East, secluded their wives in harems, and, bringing them up in ignorance, sought the charms and solace of cultivated female companionship in the *Lais* and *Phrynes* of the day. The Jews, during the historical period, maintained the practice of polygamy till late in the Christian era, when it was abolished by the Emperors Theodosius and Arcadius, who prescribed the Roman system of monogamy; though we learn from Selden's "*Uxor Ebraica*,"

it still prevailed among them during the sixteenth century in Italy and Hungary, as it does even now in India.¹

The absence of polygamy, and the independent condition or *status* of a wife, being first duly established among the Romans and Germans, it naturally followed that their rights as to property were fully recognised by law; but the rules adopted by them on this subject were very different.

In the earliest period of the Republic the rights and conditions of married women were entirely subordinated to the

Roman System. absolute power of the head of the family, or *paterfamilias*. The wife passed into the hus-

band's possession under the marriage contract, which pursued the forms of a sale. He had absolute powers over her as over a slave, even, as is alleged by some, to life and death. She had no dowry; she could not possess property; and whatever came to her hands immediately became the property of the husband. The injustice of these regulations was, however, felt by the great legislators of the commonwealth; and the following extract from Fraser on *Personal and Domestic Relations* describes the condition of the Roman wife at the best period of their laws:—

“The Roman wife was not held to be sunk in the husband; but after the marriage she remained as capable of independent action as before it. Each could possess and enjoy property; and whatever one acquired, the other could have no participation in. The wife's debts could be recovered only from herself, and the husband's were effectual only against his own person and property. But the presumption in any case was in favour of the husband; and unless the wife established by legal evidence that the property was hers, the husband, his heirs, or his creditors, could demand it.”

The mode in which the independence of a Roman wife, as to property, was maintained, was as follows. Previous to marriage a portion of the wife's property, called *dos* or dower, was set apart for the expenses of the wedded state. The administration of this settled property was committed to the husband, and if it were of a perishable nature (*res fungibiles*), he became absolute owner of it; but, if of land, he had no power of alienation, not

¹ See Perry's *Oriental Cases*, p. 122.

even with the wife's consent, except under very special circumstances. All her other property, moveable or immoveable, whether acquired before marriage or after, was entirely under her own authority and control, and was called paraphernalia (*bona parapherna*). Even with respect to the personal property of the wife, though it was always alienable, the husband was obliged to restore it to the wife in case of a dissolution of the marriage. In order to secure this restitution, he had to make a gift (*donatio*) to his wife antecedent to the marriage; and if by the provision of the marriage settlement the husband had any benefit by survivorship out of the *dos*, the wife had a proportionate benefit out of the *donatio*.

Under the German system a community of goods was created on marriage between husband and wife, by which the survivor succeeded either to the whole for life, or to one clear half absolutely, the custom varying among different tribes. Blackstone cites two remarkable passages from Tacitus and Cæsar on this subject, which clearly show the antiquity of the custom, as we still find it prevailing among the Teutonic races of Europe, in Scotland, Germany, Scandinavia, and even in France.

There can be no doubt that the old English law recognised the same principles in early times.

Anglo-Saxon and
Old English System.

Selden (*Uxor Ebraica*, b. ii., c. xviii.) records a law of King Edmund's (A.D. 940) by which the wife took half the property if the husband died childless, and the whole if he left children, so long as she continued a widow. So also by the common law which, according to Sir Henry Finch, prevailed as late as the reign of Charles I., a man's goods on his death were divided into three parts, one of which went to his heirs, another to his wife, and a third was at his own disposal. If there were no children, a clear moiety went to his wife. A clear reflex of this German principle in our law may also be seen in the marriage service of the Church of England, as we may be sure that the solemn statement at the altar by the husband to his wife, "With all my worldly goods I thee endow," was not originally an unmeaning formula. As Blackstone, however, states, "This law is at present altered

by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels: though we cannot trace out when first this alteration began." It would be interesting if we could discover in our law reports any trace of those imperceptible degrees by which learned judges ruled in favour of the husband's power to disinherit his wife, for it was not the Legislature who made any alteration in the law; we may, however, fairly conclude that wives were not heard or consulted on the subject, and that the legal maxim prevailed, *de non apparentibus et non existentibus eadem est ratio*.

Present State of
English Law on
Subject.

The Common Law of England, as to the property of married women, may be stated in a few words.

In the language of Lord Coke, "Marriage is an absolute gift to the husband of the goods, personal chattels, and effects and estate of which the wife was actually and beneficially possessed at the time of marriage in her own right, and of such other goods and chattels as come to her during the marriage." If the husband survive his wife, he will, as her administrator, be entitled to all her personal estate, which continued in action or unrecovered at her death. He is also entitled to all her landed property during the marriage, and, if there is an heir born, to the enjoyment of such property after her death. In the words of Lord Mansfield: "By the Common Law a wife has no property of her own; her personal estate absolutely, and her real estate during coverture, are her husband's." She has, indeed, a species of property in the jewels and trinkets which her husband or friends may give to her, and which, by a limited use of the original meaning of the word, are called *paraphernalia*; but even these the husband may sell or dispose of, and they are liable to seizure by creditors for his debts. The wife's being during marriage is absolutely absorbed into that of her husband, and the legal fiction has been created that husband and wife form but one person in law. It follows from this fiction that a married woman can make no contract, that she can neither sue nor be sued; and although she may be legally separated from her husband, and have, in fact, an ample separate maintenance, she is not liable, on her contracts, even for the necessities of life.

Nor, by the law of England, is the husband liable in such case, and thus, by this whimsical ruling of the law, the butcher, baker, and other tradesmen who may have given credit to a married woman with a separate maintenance of 1,000*l.* a year, have positively no one against whom they can resort in law to recover their just demands.

The unreasonableness of the Common Law of England on this head, and its unfitness for the relations of modern civilized life, are so self-evident, that the Legislature would have been called upon long ago to enact more liberal and larger provisions, had not Courts of Equity stepped in to correct the antiquated rules and harshness of Courts of Law. Equity has long ago rejected the legal fiction of a married woman having no *personality*; has recognised that a married woman may possess separate property without disturbing the harmony of the married state; that having property, she may dispose of it at her own pleasure; that she may make contracts respecting it; and, as a necessary consequence, that she may be sued on her own contracts. Indeed, it may safely be predicted that if a succession of judges like Lord Mansfield had sat on the Common Law bench, the discrepancy between law and equity, which is now so startling, would have disappeared, and that the necessity for an appeal to the Legislature a century after that great magistrate graced the judgment-seat, would probably not have arisen. To obtain a clear view of the present state of the law with respect to the property of married women, it is instructive to mark how the successors of Lord Mansfield treated his doctrine as to deeds of separation. In the case of a London tradesman who sued Lady Lanesborough, in the last century, for goods furnished to her, it appeared that the countess was living separate from her husband, with an ample maintenance which was regularly paid; but the defence to the action was, that she was a married woman. Lord Mansfield, in giving judgment, after pointing out what the general rule was as to the inability of a married woman to contract, and that exceptions founded on necessity had been introduced from time to time, made the following sensible observations:—"General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the

reason of the rule ; and exceptions are introduced which, grafted upon the rule, form a system of law. *Quicquid agunt homines* is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." And he held that as this lady had ample separate property, it was for the interests of married women themselves, as well as for creditors who supplied them, that they should be held liable on their contracts. But how was this doctrine treated by the Courts of Law some years subsequently ?

An exactly similar case came before Lord Kenyon and the twelve judges, and this was the technical reasoning on which the decision of Lord Mansfield was overruled. "The ground on which the plaintiff in this case rests his claim is an agreement between the defendant and her husband to live separate from one another. That is a contract supposed to be made between two parties, *who, according to the text of Littleton, s. 168, being in law but one person, are, on that account, unable to contract with each other* ; and if the foundations fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*."

But although Littleton, s. 168, afforded such all-sufficient reasoning for the invalidity of a separation, Lord Kenyon thought fit to add some moral grounds to fortify his decision, and satisfy the general public as to the wisdom of the law. He continued—"If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve ; and which, without dissolving the bonds of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married ; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character."

Yet nothing is more clear at the present day than that deeds of separation between husband and wife are valid, and will be enforced in equity.—(2 Bright's Husband and Wife, 307, 317.)

In order to place the direct conflict between Law and Equity in its rulings as to the property of married women in a clear light, we subjoin in separate columns a few of the *antinomie* on the subject:—

Conflict between Law and Equity.

LAW.

1. "By the Common Law, the wife has no property of her own; her personal estate absolutely, and her real estate during coverture, are her husband's."—Per Lord Mansfield.

2. "By the Common Law, the wife has no separate power of contracting. She can neither sue nor be sued."—Per Lord Mansfield.

3. "Marriage is an absolute gift to the husband of the goods, &c. of which the wife was actually possessed at the time of marriage, and of such other goods and personal chattels as come to her during the marriage."—Lord Coke.

4. If a husband obtains a judgment for a debt due to his wife at law, he is entitled to the whole fund.

5. So with respect to a legacy, the husband may appropriate the whole, if the executor pays it him.

6. A woman, by law, cannot dispose of her property, nor make a will, without the concurrence of her husband.

EQUITY.

1. "Every kind of property, including estates in fee simple and chattels personal, may be subject to a trust for the wife's separate use, which will be supported in equity."

"She may dispose of such property as if she were a *feme sole*."

"She may dispose of her savings, as of the principal."

2. Equity allows a married woman to sue wherever she has a clear right. She may even sue her husband, when "there is no other way of asserting her right against him."—Per Lord Loughborough.

Being considered a *feme sole* in respect of her property, she may be sued on her own contract with respect to such property.

3. "If land or personalty is left to a married woman, for her separate use, even without the intervention of trustees, equity secures such property for her separate use."

4. "If it is necessary to have recourse to equity, equity will compel him to secure a provision for his wife out of the fund."

5. Equity will compel a settlement in such a case.

6. She may in equity.

LAW.

7. If a wife carries on a separate trade, even with her husband's consent, he is entitled to all the profits.—4 B. & Ad. 514.

8. Deeds of separation are not valid at law.—Marshall v. Rutton, 8 T. R.

9. "A husband cannot give or grant any estate to his wife, either in possession, reversion, or remainder, though an exception under the Statute of Uses has been introduced."

EQUITY.

7. Equity gives the profits to the wife, if the trade is carried on out of her separate estate.

8. In equity "it may be considered, as at present settled, that such deeds . . . are valid."—2 Bright's H. and W.

9. "Although gifts of property by the husband and the wife are . . . void in law, yet they will be supported in equity."—*Ib.*

We think it self-evident that the statements we have thus made as to the existing law of the land, by which it will be seen that two different sets of Courts dispense diametrically opposite rules, and in point of fact two distinct codes, on the all-important subject of marriage, are most discreditable to our system of laws, if any claim for principle on comprehensive views should be set up for them.

It appears, however, to your Committee that the operation of the law is even more reprehensible than its want of scientific character and uniformity.

Under the present law the practice in society is, that among the upper and wealthier classes parents rarely allow their daughters to marry without securing for them some provision by the interposition of trustees.

Operation of the
Law as to Married
Women.

If the woman has property she may, by this mode, secure the separate enjoyment of it to herself. So also, any relative or friend who desires to give separate property to a married woman, may secure the possession of it to her by law, without the least right of interference on the part of the husband.

But in all cases where parties marry without any antenuptial contract, and where property is bequeathed to or acquired by the wife, without the technical words which create separate property, such property and acquisitions fall into the possession and absolute power of the husband.

The operation of these laws is, that the rich are enabled, in many cases, to avoid the harshness of the Common Law, from which the middle classes, and those too poor to encounter the expenses of Courts of Equity, are unable to escape. But even the rich, in many cases, fall under the rigour of the Common Law; for wherever a marriage takes place without settlements, the Common Law rules prevail. So also do they in numerous cases in which Equity, from its limited power of modifying the Common Law, has been unable to extend or apply the broad and just principle on which, in other cases, it proceeds. The petitions which have been presented to Parliament during the present session, signed by about 24,000 persons, show that public attention is attracted to the subject, and we have reason to believe that the existing law operates grievously in society.

Your Committee, therefore, are clearly of opinion that it is the duty of the Legislature to amend the present state of the law affecting the property of married women, and to introduce one uniform rule, based on general principles, which shall keep in view all the relations of the married state, be applicable to all classes, and be administered by all courts of justice, whether of law or of equity.

Before proceeding to discuss the principles on which a new law should be founded, we think that it will facilitate the inquiry to state the mode in which other countries, especially France and America, have dealt with the subject.

We believe that the following may be taken as a sufficiently accurate summary of the present law of France.

Marriages take place in France under the *Régime de Communauté*, or *Régime dotal*.

1. *Régime de Communauté* is either *légal* or *contractuelle*. By the first, which is by operation of law without any contract, all the *moveable* property of the man and woman, both at marriage or acquired during marriage (except specific legacies specially tied up), and the *immoveable* property acquired during marriage, form one mass called *communauté*, which is administered by the husband, and may be aliened by him during marriage, but cannot be bequeathed except as to his share; and

at the dissolution of the marriage, a partition takes place between husband and wife or their representatives.

The wife's immoveable property belongs to the wife alone, but the rents, and profits, and administration go to the husband.

The *communauté*, and therefore the husband, is answerable for all the debts (except those belonging to the real estate) of the wife, both before marriage, or contracted during the marriage. The wife can obtain a *séparation des biens*, that is, a division of the moveable property, and have the administration of her share committed to her, on application to a Court of Justice, if the husband is making away with the property.

By the *communauté conventionnelle*, any provisions modifying the community of law may be introduced in the antenuptial marriage contract. The usual modification is to give the wife a lesser share than half, according to the amount of moveable property she brings into the common stock.

2. *Régime dotal*. Under this system the dowry is the sum brought to the husband to sustain the charges of the marriage, and is specified in the antenuptial contract. But the contract, like English marriage settlements, may introduce any provisions whatever.

All property of the woman, not specified in the contract, is called *paraphernal*, and belongs absolutely to the wife, but she cannot alienate it without the authority of her husband.

Previously to the Revolution, the law of France differed greatly in the districts of what was called *Pays de Droit écrit*, and *Pays de Droit coutumier*. In the former division the Roman code formed the Common Law; in the latter, customs derived from the Franks and Celts prevailed. Accordingly the conflicting rules founded on Roman and German customs were in operation, as to marriage property, and it became a serious question, when the framing of a civil code for the whole nation was under deliberation, which of these rules to adopt. A most interesting discussion on the subject will be found in the "*Discussions du Code Civil*," tom. ii., containing the debates in the Council of State over which Napoleon presided; and the conclusion arrived at was, that parties should be at liberty to marry either under the Roman or the German *régime*, but if

no agreement took place on the subject before marriage, then the marriage was to be deemed to have proceeded on the principle of community of goods.

The following interesting information has been obtained by a member of your Committee as to the mode in which this law operates. The law being quite free to parties to choose which *régime* they will, Baron Charles Dupin states that "ninety-nine per cent. of all marriages are made *en communauté*—all those of the industrial classes without exception, and also nearly all of the middle classes. The *dotal* is chiefly resorted to when the parents or guardians of the wife have a distrust of the prudence of the husband." Count de Circourt also says, "The *dotal régime* is found very efficient for the protection of the wife's property against a spendthrift or inconsiderate husband, but impedes the freedom of operation to such a point, that among the tradesmen of all ranks and denominations the *régime dotal* is either impossible or ruinous. Nor can it agree with the habits, and still less with the interests, of the middle class. The effects upon the good harmony of married persons are not decidedly bad, but on the whole it is disliked among us, and many gentlemen do positively object to its being made a part of their matrimonial contract."

The United States of America, which for the most part adopted the Common Law of England, some with, some without, the correctives of Courts of Equity, have, during a long course of years, gradually modified the harshness of the law which denies property to married women. And in the great States of New York and Pennsylvania, as well as in New England, in Texas, California, and the newly settled States, a married woman is allowed, with more or less modification, the same rights over property as if she were single. In the States where the civil law prevailed, the provisions of the Roman code had already secured independence to married women. We have obtained on this subject, from the Rev. F. Channing, of New England, such an interesting synopsis of the law of the different States, with extracts from their different statute-books, that we have inserted it in the Appendix.

By the Scotch law the principle of *communio bonorum* prevails. Under that law a widow takes half the moveable property on her husband's death if there are no children, and one-third if there are. If she predecease her husband, until last year her heirs or legatees were entitled to one-half, or one-third, as the case might be; but by a law introduced by Mr. Dunlop, 18 and 19 Vict. c. 23, this provision was repealed in favour of husbands. The widow also takes the *terce*, or life-rent of one-third of all the lands or heritable property of the husband.

The husband, however, by the Scotch law, is entitled to the administration of the wife's property, and this principle was formerly carried so far, as, in fact, to deny her the enjoyment of any separate property, unless it was, for her benefit, vested in trustees. But now, according to Fraser, vol. i. 406:—"This refined subtilty, which has for its basis the assumption that a wife is absolutely incapable of holding any right to property," is completely exploded—and if the *jus mariti* be renounced by the husband, or the wife's property is declared to be free from it, the declaration or renunciation will be as valid as if it were a contract made between two strangers. And by the present law, a Scotch wife may possess property of all kinds, even furniture, independent of her husband, and such property, though living with him, is not liable to seizure by creditors for her husband's debts.

The following extract from Thibaut (*System des Pandekten Rechts*, vol. i. 257) shows what the law on the subject is in modern Germany:

"By custom and Statute Law in Germany, marriage very frequently creates a community of goods between husband and wife, either of the whole property, or by special agreement, sometimes as to the property during marriage, sometimes only as to what is acquired by the joint efforts of the married couple. . . . By the Common Law (Roman) the general principle is, that husband and wife acquire a separate property in their own earnings (excepting the domestic services of the wife,) and that in joint labours they acquire *pro rata*."

It will be thus seen that the codes of all nations in a pro-

gressive state of civilization, have a tendency to raise the social position of married women with respect to property. In England, it is true, the Common Law has introduced harsh rules, peculiarly its own, and differing from the Teutonic original from which it was derived ; but the modifications which Equity has made may be looked upon as indicative of the demands of the age for more just and more generous legislation.

It will be seen also that the superior position of married women under other systems of law than our own is secured in one of two ways. Either by treating her as a complete partner with respect to all the personal property possessed by husband and wife, and retaining in her the entire ownership over her landed property, or by giving her the ownership of all her property, except such portion of it as may be set apart by antenuptial contract for the expenses of the marriage.

In considering what the general rule should be which the English Legislature ought to adopt, it is important to limit our attention to the class of cases for which any such rule is required.

It would be most unwise and inexpedient for the Legislature to fetter the discretion or power of individuals to make such conditions as they choose in their marriage contracts. All that the Legislature is called upon to do is to lay down a rule founded on just principles which shall come into operation where parties through heedlessness, ignorance, or inability, have made no rule for themselves. Such cases occur when parties marry without settlements, and where property is given or bequeathed to a married woman without an attorney to frame the bequest, or where separate earnings altogether independent of the husband's assistance are acquired by the wife. In these cases the English Common Law gives such property absolutely to the husband, and this rule, in the opinion of your Committee, is branded with injustice.

It is clear that the Legislature, if it determines to increase the legal rights of married women, may either adopt the principle of *communio bonorum*, or it may adopt the principle of the Roman law, and enact that all a woman's property which

is not settled previous to her marriage, shall continue to be her own.

In weighing the merits of these two principles there is much to be said for each. The community of goods between man and wife, the administration being left in the hands of the husband, with equal rights of succession to the survivor, is deemed by many to agree more with the ideal of a happy marriage than any other that can be devised. We may probably assume that, in the greater number of marriages there is only one common interest and that law would appear to be the wisest which should be in accordance with such a state of things. We have also shown that in France, where the two principles come in competition, the tendency of society is unquestionably in favour of the community of goods.

But your Committee think it would be inexpedient to introduce this system into England. In those countries where it prevails, much greater equality of fortune exists between men and women than with us. In France, owing to the law of partition, a daughter takes an equal share of the patrimonial property with her brother. A Bill which should propose to an English House of Commons to give the wife a half-share in her husband's personal property, would probably have very little chance of becoming an Act of Parliament. Moreover, the system of community of goods requires something like a judicial investigation on the death of either party, in order to ascertain the share of the survivor. The numerous nice questions which arise on partition give rise to voluminous works in the French Law, a specimen of which may be seen in "*Pothier's Essai sur la Communauté.*" A country which has been long familiarized with the system may bear it, but to introduce it into England with all its complexity would be a serious and startling innovation.

Lastly, under such a system there must be some protection for married women against a dissolute, profligate, or heedless husband, who is making away with the common stock. This is secured by the Roman law as to the *dos*, or settled property, and by the French law as to *communauté*, by the power

in the wife to obtain a decree of the Court for a separation of property. This does not imply a complete separation, as is often alleged in this country, but is a most beneficial process by which a married woman, with a better head on her shoulders than the spendthrift husband whom she desires to save, is enabled to secure her share of the joint property. But, independently of the evil of driving a married woman to complain in open court of her husband, a husband perhaps whom she fondly loves, it is evident that with the present organization and procedure of English Courts, the classes for whom an improved state of the law is chiefly desired would be practically without any redress in such cases.

To the principle of separate property none of the above grave objections seem to apply. It has the advantage of being already recognised by Courts of Equity. So

Principle of Separate Property. that if it were laid down by the Legislature as the law of the land, that a married woman who had married without a settlement should retain and possess property as if she were a single woman, on every difficulty or disputed point that might arise, a satisfactory solution would be found in the course adopted by equity.

The arguments which chiefly present themselves in favour of this principle are its simplicity, and its accordance with the arrangements which women of the wealthier and more highly instructed classes make for themselves. A husband retains his own property on marriage, why should not a wife? He is enabled to spend his earnings as he lists; is it likely that a wife and mother will be less solicitous for the well-being and well-doing of her household? We think probably the reverse is the case, and we feel certain, that if the industrious factory-woman were able to deposit in the savings-bank a portion of her earnings in her own name, the school-pence for her children would be very seldom withheld.

If separate property were recognised by law in married women, it would necessarily follow that the incidents of property should attach. We think that a married woman with separate property should undoubtedly be liable on her own contracts as she is now in equity. We think also, that having separate

property, she ought to be jointly liable for the maintenance of her children.

But looking to the respective positions of husband and wife, we do not think the Common Law liability of the husband to maintain his wife ought to be in any way impaired.

The husband, from his sex, from his strength, from the habits of society, has means of earning a livelihood which are not open to women ; the latter also, in their normal position, are occupied in household duties by which the labours of the husband are set free. The liability of the husband, therefore, appears to rest on the firmest basis.

Your Committee, on the grounds above set forth, recommend that a law of property as to married women should be based on the following principles :—

Heads of New Law of Property as to Married Women.

1. The Common Law rules which make marriage a gift of all the woman's personal property to the husband to be repealed.

2. Power in married women to hold separate property by law as she now may in equity.

3. A woman marrying without any antenuptial contract, to retain her property and after acquisitions and earnings as if she were a *feme sole*.

4. A married woman, having separate property, to be liable on her separate contracts, whether made before or after marriage.

5. A husband not to be liable for the antenuptial debts of his wife any further than any property brought to him by his wife under settlement extends.

6. A married woman to have the power of making a will ; and on her death intestate, the principles of the Statute of Distributions as to her husband's personalty *mutatis mutandis* to apply to the property of the wife.

7. The rights of succession between husband and wife, whether as to real or personal estate, to curtesy or dower, to be framed on principles of equal justice to each party.

II. REPORT OF THE COMMITTEE ON JUDICIAL STATISTICS.

Your Committee have taken into their consideration the valuable paper read by Professor Leone Levi on Judicial Statistics, and recognize in it elements of the greatest importance. Such statistics afford the best, if not the only, means of noting the practical working of laws and tribunals, of testing the principles of legal reforms, and of estimating the utility of any system of jurisprudence by the testimony of actual facts. That law reform has been in many cases unsuccessful, and that measures are often passed which neither remedy evils nor supply wants, is mainly owing to the course we have too long pursued of legislating in the dark, and to the fact that we have not made sufficient use of the experience of the Past. These observations apply more particularly to cases where new Courts of justice are to be established, the jurisdiction of existing ones is to be changed, or provisions are to be made for the more efficient administration of the law.

The Paper before us refers to three separate branches of Judicial Statistics; the First dealing with facts relating to crimes and criminals, the Second with facts connected with civil and commercial justice, and the Third with facts illustrating our judicial organization generally. The Committee propose to dwell upon each of these subjects separately; but have resolved, in the first place, to discuss the last of them, as it presents many points of striking interest, and the existing information respecting it is peculiarly defective.

Publicity and public opinion are the two most efficient engines of progress; they are the best correctors of abuses, and constitute the chief strength of really sound institutions. Our Courts of Justice, therefore, so far as their proceedings are open to public criticism, are conducted in a satisfactory manner, and no one questions the ability, impartiality, and integrity which mark their decisions; but where they fail to give satisfaction is in those portions of their administration which are not exposed to popular observation. Had the public been as well aware of the complexity, the tardiness, and the expense of what may be termed the machinery by which legal proceedings are conducted

as they are of the excellence of the judgments by which those proceedings are terminated, they would long since have demanded a searching reform of the entire system of procedure and practice. It is high time that our Courts of Justice, like other departments of the State, should give an annual account of their stewardship, and that we should be able to ascertain yearly the extent and efficiency of our judicial organization. At present we are, to a great extent, ignorant of the number of Courts in the United Kingdom, of the limits of their respective jurisdictions, of the nature and amount of the business they transact, of the number of their Judges and officers, of the extent to which such judges and officers are employed, and of the mode in which they are paid. Neither have we sufficient data to ascertain whether each Court discharges its duties in an efficient manner,—whether some tribunals are over-tasked, while others have not sufficient to do,—and whether the judicial strength assigned to each particular district keeps pace with the periodical changes in its population. Were statistical returns on these matters regularly furnished, we should be far better able to supply deficiencies on the one hand, and to lop redundancies on the other. One obvious advantage derivable from such returns would be the opportunity afforded by them for contrasting the comparative merits of different tribunals. Thus a knowledge of the number of complaints entered in any Court would of itself enable us to form a tolerable judgment respecting its popularity, while the relative efficiency of two Courts exercising the same jurisdiction, and adopting the same mode of procedure, might be tested by a comparison of the amount of business transacted by each. If, for instance, it were made apparent by returns, that suitors exhibited a marked dislike to any one of the Superior Courts of Common Law at Westminster, and that the writs issued out of that Court bore no comparison to the numbers issued out of the other Courts, we should be led naturally to the inference that the tribunal thus shunned was for some cause or other defective, and that either the Judges were inefficient, or the Masters dilatory or discourteous, or the Counsel feeble, or the fees disproportionately high. The precise nature of the defect would, of course, still remain

uncertain ; but we should have gained one important step in knowing that the defect existed somewhere, and our special attention being thus directed to the subject, we should not be long before we discovered the real source of the evil, and applied the fitting remedy. Precisely similar observations would apply to the different Courts of Equity, were statistical returns made showing that while one Vice-Chancellor had more business to dispose of than he could possibly deal with in a satisfactory manner, another was enjoying, to a considerable extent, a dignified leisure. But this is not all ; for the index of popularity afforded by the number of causes entered in any Court becomes all the more striking when two tribunals, adopting different modes of procedure, exercise concurrent jurisdiction over some particular subject-matter. Let us take, for example, the Court of Admiralty and the Superior Courts of Common Law, to either of which Courts suitors at their option may have recourse in certain cases of collision. Now, if it were shown by the returns that three-fourths of these cases were tried before Dr. Lushington, it would follow almost as a necessary consequence that either in the wisdom of the judgments, in the speed of the proceedings, or in the nature of the remedy, or in the amount of costs incurred, the tribunal in which Civil Law was administered afforded more satisfaction than those which adopted the principles and practice of the Common Law ; but if, on the other hand, only a small proportion of these cases was brought before the Court of Admiralty, we might reasonably assume that that tribunal was not regarded by the public as dispensing justice in an efficient manner. Again, the relative merits of the Superior Common Law Courts and the County Courts might be fairly contrasted, if we had any authentic means of knowing how many actions to recover sums exceeding 20*l.* and not exceeding 50*l.* had, within a given period, been entertained respectively by these Courts. At present we only know that, in the year 1854, 9,395 of such complaints were entered in the County Courts, out of which number 5,300 were tried ; but our statistics fail us when we seek to ascertain how many cases of a similar character have, during the same year, been disposed of in Westminster Hall.

A second advantage that we should gain from these returns would be this; they would afford us the means of forming a reasonable estimate of the comparative excellence of our different Judges. Let us suppose that an annual return was presented to Parliament, showing what number of appeals had been brought from each of the Superior Courts of Equity, and what had been the result of these appeals. Is it not obvious that such a return would be of great service, not only because it would have the effect of keeping alive a spirit of honourable emulation among the Vice-Chancellors, but because it would materially assist both the Government and the country in discovering the existence of real judicial merit in the event of any vacancy occurring in the higher grades of the profession. A return of the number of new trials granted on the ground either of misdirection, or of the improper admission or rejection of evidence, would, for similar reasons, be a document of much value if the names of the Judges who caused the miscarriage of the former trials were given.

Many other benefits which would accrue from these returns might be pointed out, but it will suffice here to state that a knowledge of the working capacity of our Courts of Justice, as tested by the arrears respectively left by each from year to year, would go some way towards preventing long delays, which so often constitute a source of public discontent.

But although information on these subjects would undoubtedly be of the highest importance, it is singular enough that no department of the State has hitherto been intrusted with the collection of the necessary facts; and of the practical working of many of our tribunals we know next to nothing. It is true that certain returns have from time to time been obtained by Parliament; but they have almost uniformly been isolated, and, as it were, accidental. The items detailed in them have varied with the circumstances which called them forth, and with the taste, caprice, knowledge, or peculiar views of the Member who moved for them. On some heads the fullest information has been gathered, while on others nothing whatever has been asked. Hence no symmetry, no unity, and no comprehensiveness of plan is exhibited by these returns.

Nor have we any means of comparing the state of all the Courts at any one time, so as to test their relative, as well as their respective, efficiency; and, indeed, the information we possess respecting them is of the most vague and casual description, though the interests of justice imperatively demand that it should be characterized by uniformity of plan, universality of system, and certainty of publication. Moreover, the present mode of publication is not less troublesome or costly than if the statistics of our judicial organization were complete. Laying aside the actual loss we sustain from ignorance of existing evils, which are consequently overlooked and left without remedy, much time, labour, and money are unprofitably wasted in the few disconnected returns now given, without producing any proportional amount of substantial good.

In order to estimate the value of the information we possess, we will glance over some of the returns given by our Courts. The first we shall notice is a return to the House of Lords of the 27th March, 1855, giving the names of the Judges and Officers of the principal Courts, the amount of their salaries, the fund out of which each salary is paid, the gross total amount of fees collected from suitors, the purposes to which such fees were appropriated, and the fund out of which the expenses of each Court are defrayed. Important as such return is, giving in one view the *personnel* of a considerable portion of our judicial system, it is in many points greatly defective. For instance, the account refers only to thirteen Courts in England, three Courts in Scotland, and eight in Ireland, though many more Courts exist in the United Kingdom. The House of Lords, as the principal Court of Appeal, is not included; and without alluding to any omission with respect to Scotland or Ireland, it is sufficient to point out that no notice is taken of the Superior Courts of Law or Equity in Lancaster or Durham, or of the Court of the Vice-Warden of the Stannaries, or of the Courts of the Vice-Chancellors of our Universities, or of the Courts in the City of London, or of the numerous Borough Courts, or of the Courts of Quarter Sessions, or of the Diocesan or Peculiar Courts, or of any Ecclesiastical Courts in the Province of York, or of the Police Courts. In some of these Courts,

it is true, the Judges receive no salaries, while in others they are paid, not by the public, but by particular corporations; but still it is particularly desirable that a complete statement should be furnished, showing in one glance all the tribunals which in any form administer justice throughout the United Kingdom.

Notwithstanding, however, these defects in the return, it contains most interesting information. For instance, we learn from it that the seven Equity Judges receive in the aggregate £39,000 a year, exclusive of £4,000 per annum to which the Lord Chancellor is entitled as Speaker of the House of Lords. Again, this high functionary has twelve officers immediately under him, who receive together £5,200 a year, while the Master of the Rolls has eight officers, whose united salaries amount to £3,200 a year. The circumstance, too, which is very remarkable is, that although the Master of the Rolls has two secretaries, the one receiving £1,200 and the other £1,000 a year, the Lords Justices have each but one secretary with the very moderate salary of £400 a year. We further learn from the Report that eight out of the eleven Registrars of the Court of Chancery receive salaries ranging from £1,500 to £2,000 per annum, that the two Examiners have £1,500 each, that the Chief Clerks of the Vice-Chancellors have £1,200 apiece, and that the six Taxing Masters have £2,000 a year each. We are inclined to mention these facts because they are probably not generally known, and because at the present time, when the question of the salaries of the County Court Judges is under the consideration of Parliament, it may be of service to know how other judicial officers are paid. Moreover, the Report tells us that the total amount paid to the Judges and Officers of the Court of Chancery is no less than £164,000 a year; a sum undoubtedly large in itself, but one the gigantic proportions of which become all the more striking when we remember that it exceeds, by more than £80,000 a year, the whole cost of all our judicial establishments in Scotland. With accounts such as these we are enabled to estimate not only the cost of our judicial organization collectively, but relatively with respect to the amount of work done by each Court.

Another return of importance was furnished to the House of

Lords on the 21st March, 1854, from the chambers of Vice-Chancellor Stuart relative to suits brought into his chambers in 1853. This return is well tabulated, showing the titles of the causes, their general object, the date of the decree or order of the Court in each case, the date when such decree or order was brought into chambers, the state of proceedings in each cause at the time when the return was made, the date of the last hearing, the effect of the last order, and, lastly, the cause of delay, where any has occurred. We believe that if returns such as these were made every year on a uniform plan from the chambers of each Judge, showing the totals under each head in a classified manner, the results obtainable would prove of the greatest value; but so long as they are wanting in these elements, the isolated returns are productive of little if any profit.

We proceed now to another return from the superior Court of Common Law, dated the 15th of March, 1853, which purports to give the number of writs issued, of appearances entered, of causes tried, of motions for new trials, of motions to arrest judgment, and of writs of error disposed of in 1852, together with a large amount of other statistical details relative to the working of these Courts. This return, however, is very imperfectly prepared. Not only is no effort made to arrange the several matters in a tabular shape, but the different subjects are huddled together by a variety of different contributors, without any regard being paid either to order or usefulness. Every form is bad, and each Court adopts a separate one. One question related to the number of new trials granted during the year 1852, and the return was required to specify how many were granted for misdirection, how many for the improper admission or rejection of evidence, and how many for other causes. This was obviously an important inquiry, as the answer would tend to show, first, whether the rules of evidence were or were not sufficiently intelligible to be safely enforced in practice; and next, whether the judges had discharged their duties of explaining the law with ordinary care and ability. But no answer was in fact given, the Masters excusing themselves by saying that the rules of Court afforded them no means

of stating on what grounds the new trials were granted. Another question related to the number of executions issued during the year, and it was required to distinguish in the return between the process against the person and the process against the goods. But here also the Masters of two of the Courts, the Queen's Bench and the Exchequer, declared their inability to make the distinction as prayed. We need not dwell on other defects in these returns, for those cited are sufficient to show that the records of the superior Courts of Common Law, however they may now be kept, were not in 1853 in a satisfactory state. Still, defective as the returns are, we are enabled to gather from them some curious information. Thus it appears that when the number of writs of summons issued from the three Courts at Westminster in the year 1842 amounted to 134,816, they had been reduced very nearly one-half by the year 1852, the numbers in that year being only 71,068. Whether the establishment of the County Courts in 1846 has been the sole cause of this startling diminution of business, it is not for us to determine, but we mention the circumstance as one deserving of attentive consideration. Another interesting fact relates to the manner in which the business is distributed among the three Courts, and furnishes an indication of the comparative popularity of each Court. It appears from the return in question that the 71,068 writs, which were issued in 1852, were made up in the following manner: 21,625 issued from the Court of Queen's Bench, 17,879 from the Court of Common Pleas, and 31,564 from the Court of Exchequer.

In some few cases, where Commissions have been issued to inquire into certain Courts, valuable statistical returns have been given in the appendices to the reports. For instance, the Commissioners, who were appointed some time ago to report on the Court of Bankruptcy, furnished excellent tables, showing the number of petitions for adjudication, and for arrangement, the dates of the bankruptcies, and their results, the amount of assets, the expenditure in all its subdivisions, and the number of certificates granted of different classes. But in this, as in other cases of Royal Commissions, the object of the inquiry was of a temporary character, and consequently the information obtained,

though not devoid of interest, was comparatively valueless for want of being periodically continued.

Another valuable return was published in 1855 by the Court of Prizes, showing the name, master, and tonnage of every ship captured, the nature of her cargo, and the colours under which she was sailing, the names of the capturing ship, and of her master, the date and grounds of capture, the date of adjudication, its result, and the proceeds, &c. This return was of obvious importance, indicating, as it did, the comparative utility of blockade, the working of the blockading squadron, the value of the property captured, and the extent of the injury thereby inflicted on the enemy.

But, perhaps, the most valuable and comprehensive of the different returns is that of the County Courts, which, unlike all other returns, has hitherto—thanks to the zeal of a private Member of Parliament, Mr. Fitzroy—been annually made in a manner worthy of special commendation. These returns give the number of plaints entered in each Court, distinguishing those entered for claims exceeding £20; the number of causes tried in each Court, with a similar distinction as to amounts; the number of days each Court sat; the average number of hours comprised in each sitting; the number of Courts held before a Deputy Judge; the amount of moneys for which the plaints were entered, and that for which judgment was obtained, exclusive of costs; the amounts of such costs; the amount of Court fees; the amount of moneys paid into Court both before and after judgment; the number of causes tried in each Court by a Jury; the number of executions issued, whether against the person or against the goods; and several other particulars. Previous to the year 1854, these returns also specified the number of plaints entered and causes tried under the optional clause of the Act of the 13th and 14th of Vic., c. 61, as well as the number of appeals brought, and the results of such appeals. In the returns of 1854, however, information on these important heads has either been designedly or accidentally omitted, and we allude to the fact, because the omission, in our opinion, ought without delay to be remedied. We strongly recommend all persons, who feel an interest in judicial statistics, to examine

carefully these elaborate returns from the County Courts, as they show not only the ease with which the most varied information may be reduced into a statistical form, but also the extreme utility of bringing out perspicuously, in a tabular manner, facts which could scarcely be made intelligible by any more general statement.

A comparison of the returns thus sparingly, and at random, given by our Courts of Justice with what is done on the subject in other countries, may here be useful and suggestive. Professor Levy's paper has referred to the judicial statistics of France. These are annually presented, in two volumes, by the Minister of Justice to the Emperor, one volume on Criminal Statistics, and the other on Civil and Commercial Justice. The tables in both volumes are preceded by a report commenting on the facts, and showing by comparison and calculation the state and progress of society, as well as of the Courts of Justice. It may be observed that the utility of these documents mainly depends on the ability with which they are drawn up. Casual readers of such voluminous accounts are startled at the abundance of materials furnished, and scarcely able, unless assisted by competent and scientific persons, to elicit the real lessons which they afford. The volume entitled "*Compte Général de l'Administration de la Justice Civile et Commerciale en France pendant l'année 1853*" is divided into four parts. The first relates to the Court of Cassation or principal Court of Appeal, and shows the number of decrees given, classified according to the subject-matter, and distinguishing the Court or Tribunal from which the appeal was made. The second part relates to the Imperial Courts, giving the same classification. The third furnishes an account of the Civil Courts with more minute distinctions, giving under each head the number of causes tried, the number of judgments given respectively for plaintiffs and defendants, and the number of interlocutory orders.

Under this head, the account gives the number of causes pending in each district, a classification of such causes according to their subject-matter and their dates; new suits enrolled for the first time; and the suits brought before the tribunal without having been enrolled at all. The results of these causes are

also stated, as well as the form and manner in which suits have been tried, settled or abandoned. The duration of the suits is given, distinguishing into separate classes those which have lasted less than three months; those from three to six months, from six to twelve, and from one to two years, or more than two years.

A voluminous table is given of the area, population, and amount of assessment of each department, the numbers and composition of the tribunals therein, and the amount of work done in civil, commercial, and criminal matters. In addition to much other interesting matter, another table is given, classifying the different Civil Tribunals, and showing the comparative amount of work done by each in the current year, and in four preceding years. Then accounts, similarly precise and complete, follow, regarding the Tribunals of Commerce, including their bankruptcy procedure, the number of partnerships enrolled during the year, and the number of forced arbitrations. The bankruptcy statistics show the number of bankruptcies in each department during the year, the amount of the debts and assets, distinguishing personal and real estate, and exhibiting the dividends paid. There are also tables showing the number of promotions to the judicial rank, and the changes which have taken place in every branch of the Judicial Officers. Such is an epitome of the information regularly published every year in France, Belgium, Sardinia, and most of the continental countries. These statistics afford the best and most authentic evidences of the social and moral progress of the nation, and furnish the safest guide to the legislator as well as to the historian and philanthropist.

The Committee beg to recommend the following resolutions for adoption by the Society :—

1st. That it is desirable to obtain accurate information respecting the judicial organization of the United Kingdom.

2nd. That the first step which should be taken for this purpose is to ascertain the number of our Courts of Justice; the nature of the Law administered in each Court, whether it be Common Law, Equity, Ecclesiastical Law, Criminal Law, Civil Law, or otherwise; the geographical limits of the jurisdiction of each

Court, specifying the area, population, and other special characteristics of each district; the number of judges and officers connected with each Court; the salaries of all such persons, and the funds out of which such salaries are paid; and the general amount of business transacted in each Court: what is wanted in the first instance, being a statistical judicial survey or census, like the Industrial, Educational, or Religious Census, which should be made periodically at intervals of five or ten years.

3rd. That the second branch of inquiry should include a detailed account of the annual working of each Court; the returns of which should specify,—

1. The number of suits commenced in each Court during the year.
2. The number settled before hearing, specifying the mode of settlement.
3. The number of trials.
4. The results of the trials, whether in favour of the plaintiffs or defendants.
5. The nature of the causes, classified under distinct heads.
6. The value of the property in dispute, if any.
7. The duration of the suits.
8. The costs of the suits.
9. The number of appeals or proceedings in error, specifying to what Courts.
10. The number of judgments, orders, or decrees, affirmed.
11. The number reversed.
12. The number of interlocutory proceedings in each cause.
13. The number of causes left in arrear.
14. The duration of the sittings in each Court specified in days and hours.

4th. That all these returns should be tabulated as far as possible in a uniform manner, so as to admit of easy comparison with each other.

5th. That in addition to these general returns, which are applicable to all Courts of Justice, further special returns should be made from particular tribunals. That, for example, it would be desirable to ascertain, with respect to the Superior Courts of Common Law—

1. The number of causes tried by special juries.
2. The number of causes tried without a jury.
3. The number of causes settled by arbitration.
4. The number of motions for new trials.
5. The number of new trials granted.
6. The grounds on which such new trials were granted.

6th. That until the appointment of a Minister of Justice, the collection of judicial statistics should be intrusted either to the Home Office, or to the statistical department of the Board of Trade.

III. LETTER FROM LORD BROUGHAM TO G. W. HASTINGS, ESQ., ON LAW REFORM DURING THE PRECEDING SESSION.

MY DEAR HASTINGS,—I cannot sufficiently express my disappointment at finding myself unable to leave home, in order to attend the yearly meeting of the Society. This, and my necessary absence from Lord Lyndhurst's committee, as well as from his motion on the Oaths Bill, has been to me the greatest vexation.

I wish I could congratulate our colleagues on the progress made of late in the amendment of the law. Let us hope, however, that the foundations have been laid of measures which another session may enable us to obtain. It really, to take a remarkable example, does seem quite impossible that this country should any longer be suffered to remain without the regular means of ascertaining how the laws are executed; that we should be the only country without the help of judicial statistics, which not only France, Sardinia, Belgium, and the German States, but even the kingdom of Naples itself, possesses, though the information there may not be turned to any very good account. On the consequences of our being thus kept in the dark as to the working of our judicial system it would be superfluous to enlarge. But I see it said in some highly respectable quarters, that one bad effect has been our carrying on law amendment empirically, and without systematic plan. Now, in one sense, we have been guided by systematic principles. The plan which I have followed for about forty years,

both before and since our Society began its labours, has been the introduction (in all departments) of natural Procedure, and getting rid of the innumerable and incalculable evils of technical Procedure. There can really hardly be named one of the improvements in our Jurisprudence during that long period which does not fall within this description. But if it be required that we should construct a new system upon improved principles, the answer is obvious: this plan could only be justified in the case of a community which either had previously no system at all, or a system so entirely vicious, that it must be utterly destroyed, and a new one put in its place. Now such happily is not the case in this country. There is very much of our existing law the soundness of which in its foundation, and the consistency in its superstructure, cannot be denied; and it is our duty to preserve what is good, removing by all safe and prudent measures whatever is vicious, and supplying what is deficient. It is not empirical or unsystematic to proceed experimentally, that is, to note what reflection and, above all, experience, proves to stand in need of correction or improvement. It forms exactly one of the most unanswerable reasons in favour of our excellent and able colleague Mr. Napier's proposal of a Minister of Justice, that there would at all times be a department charged with the duty of watching how our laws work in each particular, and propounding measures for curing the proved flaws in the system, and quickening the action of its healthy parts.

If we must come from such general topics to particulars, I would mention with satisfaction the progress which has been made in removing the anomaly brought practically to our notice by recent judicial proceedings, the anomaly of criminal breaches of trust not being visited with punishment unless in one class of excepted cases. I know not if your attention has ever been fully directed by late proceedings to another great vice in our system, the vice which we had vainly hoped would be eradicated by our grand improvement of allowing parties to be examined as witnesses in all cases; I refer to the corruption prevailing at Parliamentary elections. Living at so great a distance from the world of politics, I am ignorant of what is passing; yet I think

I can perceive indications of such a general dislike of election risks and election expenses as may very probably postpone any dissolution *in fact*, though not perhaps *in words*; so that for some time men may "speak daggers, but use none." This, however, only renders it easier and safer to devise betimes the means of extirpating the enormous evil of bribery, which, bad in itself, includes in reality the worscr crime of perjury, at least its moral guilt, inasmuch as no one takes a bribe without making up his mind to forswear himself, if the oath is tendered to him. With our distinguished colleague Sir J. Pakington I have long been in co-operation upon this important subject; and I retain, as I believe he does, my confidence in the beneficial tendency of a stringent declaration exacted from members on taking their seats. But I conceive that we should also go to the root of the evil as regards the agents of corruption. Why may we not deal with this as five-and-forty years ago I dealt with the execrable slave-trade? For the gains of that infernal traffic we found that men would run the risk of heavy pecuniary penalties, but they shrunk from the risk of being transported as felons; and the traffic ceased. So the prize of a seat in Parliament will tempt some men to run the risk of being unseated on petition, and even of being exposed as having furnished the means of corruption to their agents; and the guilty profits will induce those agents to accept the employment with the comparatively trifling hazards that now attend it. But neither the candidate nor his supporters will encounter the danger of the treadmill or transportation; and we may see bribery, as we have seen slave-trading, cease to bring disgrace upon the people of this country. Having troubled you with a reference to general principles sanctioning what may in one sense be termed occasional legislation, but only in its right sense, I have given examples of this application of those principles; and I am sure of their being important as well as seasonable.

Believe me ever,

Sincerely yours,

H. BROUGHAM.

BROUGHAM, 27 June, 1856.

Short Notes of Cases;

BEING A SELECTION

OF

ADJUDGED POINTS

REPORTED SINCE 1ST MAY, 1856.

POINTS DETERMINED IN THE COURT OF CHANCERY.

By O. D. TUDOR, Esq., Barrister.

COURTS.

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Lord Chancellor and Master of the } Rolls of Ireland	4 Ir. Ch. Rep. Part 11. 5 Ir. Ch. Rep. Part 1.

I.—POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Election. 2. Husband and Wife—Freebench or Dower not Assets for Payment of Debts. 3. Husband and Wife—Dower—Conveyance to Uses to Bar Dower, and Declaration against Dower before Dower Act—Not Binding on Woman Married since Act. 4. Husband and Wife—Reversionary Interest of Wife in Lands directed to be Sold—Fines and Recoveries Act. 5. Legacy for Life—Farming Stock—Profits Distinguishable. 6. Marriage Articles—Rectification of Settlement—Mistake. 7. Policy—Insurance by Creditor of Debtor's Life—Right to Surplus after Payment of the Debt. 8. Power of Sale by Implication—Charge of Real Estate with Payment of Sum of Money. 9. Principal and Agent—Destruction of Vouchers—Spoliation—Presumption against Spoliator. 10. Railway Company—Contract by Promoters before Incorporation, whether Binding on Company. 11. Specific Legacy of Shares—Whether Legatee or general Personal Estate liable for future Calls. 12. Tenant for Life Discharging Bond Debts—Presumption—Statute of Limitations. 13.

Title-deeds—When Bill may be Filed by Remainderman for Production of. 14. **Trustee**—When and upon what Terms he can Retire from the Trust.

1. **MORGAN V. MORGAN.** 4 Ir. Ch. Rep. 606.

Election.

* The doctrine of election applies to a remainder expectant on an estate tail, as well as to immediate interests. Thus, where a testator devised certain lands of which he was seised in fee to A., and other lands at C., of which he was seised in tail, to B., and A., on the death of the testator, became entitled in remainder expectant on the estates tail of his two brothers to the lands at C., it was held by the Lord Chancellor of Ireland, overruling *Stewart v. Henry* (Vern. & Sc. 491), that A. was bound to elect. —(See also, 1 Swanst. 362, and Stor. Eq. Jur. s. 1095.)

2. **SPYER V. HYATT.** 20 Beav. 621.

Husband and Wife—Freebench or Dower not Assets for Payment of Debts.

Sir J. Romilly, M.R., held in this case that the widow's estate of dower or freebench is not assets for the payment of the mere debts of her husband, who has died intestate. It was indeed argued, with considerable ingenuity, for the plaintiff, one of the creditors of the intestate, that the statute 3 & 4 Wm. 4, c. 104, makes freehold, customary-hold, and copyhold estates assets for the payment of debts on simple contract, as well as specialty; and the 5th section of the Dower Act, 3 & 4 Wm. 4, c. 105, enacting, "that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower;" that the result was, that the first Act subjected the copyholds to the intestate's specialty and simple-contract debts; and the second Act gave them priority over the widow's dower. His Honour, however, in giving judgment, observed: "If the argument on behalf of the plaintiff were to prevail, it would follow, that where a person, seised of lands out of which his wife is entitled to dower, dies intestate, the creditors could take the whole of the land, and altogether defeat the widow's dower; but they cannot do so. In truth, what is claimed by or comes to the widow was no part of what the intestate was seised of at his death. He died seised of lands subject to the widow's right to dower, and it is only that which became subject to the payment of his debts. Freebench

stands upon the same footing, and is not subject to the husband's debts."

3. FRY V. NOBLE. 20 Beav. 598.

Husband and Wife—Dower—Conveyance to Uses to Bar Dower, and Declaration against Dower before Dower Act—Not Binding on Woman Married since the Act.

The dower of a woman married *after* the Dower Act (3 & 4 Wm. 4, c. 105), out of an estate made subject to dower by that Act, will not be excluded by a conveyance to uses to bar dower, and a declaration against dower, contained in a conveyance *prior* to the Act. Thus, in the above-mentioned case of Fry v. Noble, real estate was conveyed to such uses as Fry, then a married man, should appoint, and in default of appointment to Fry for life, and after the determination of that estate in his lifetime to the use of B., his executors and administrators, during the life of Fry, upon trust for him, "and to the intent that the then present, *or any future, wife* of Fry might not be entitled to dower;" with remainder to the use of Fry in fee. Fry's wife having died, he, *after* the passing of the Dower Act, married again. It was held by Sir J. Romilly, M.R., that the second wife's dower was not barred by the conveyance to uses to bar dower, nor by the declaration contained in the same deed. "The question," said his Honour, "is, whether the widow is entitled to dower out of the real estate of her husband, and depends on the construction of the Dower Act. Two things are quite clear; first, that if the words 'to the intent that the present, or any future, wife of Fry might not be entitled to dower,' had been omitted from the deed of 1827, the plaintiff (the widow) would have been entitled to dower; and next, that if the deed with these words had been executed since the Dower Act, the widow would have been barred The statute appears to me to be very much to this effect:—The 2nd section gives the dower to the wife in every case where the husband of a wife married *subsequently* to the 1st of January, 1834, has an estate *equal to an estate of inheritance*. Then the 6th section says, that the wife's dower is to be taken away whenever there shall be in the conveyance of the land a declaration that she shall not be entitled to dower. This section leaving it doubtful whether the declaration is to be prospective only, or prospective and retrospective also, the 14th section says, 'but this Act shall not give to any deed executed *before* the 1st of January, 1834, the effect of *defeating or prejudicing* any right to dower.'

"I read the enactments very much as if they were three Acts of Parliament instead of three clauses. The first gives the dower, the second takes it away; but the third says that a prior deed is to have no operation at all in *defeating* dower. Independently of the 6th section, she appears to me to be entitled to her dower; and I am of opinion that the 14th section prevents the 6th section, or the declaration in the deed, from having any operation or effect.

"Although I was a member of the Legislature at the time that this Act passed, and took some part in the discussion of the real property statutes which then passed, I am unable to state what motive the Legislature had in providing that the ordinary uses to bar dower, which expressed an intention that dower should not attach, should for the future have no operation, and yet allowing a simple declaration, in another form of words, to have that effect. It is somewhat difficult to understand, where the intention is clear, why the Legislature should have preferred one mode of expressing that intention to another. It appears somewhat capricious, but I can only construe the Act as I find it. It seems to be pretty clear that the Real Property Commissioners, from whom this statute originated, seem to have had an intention of putting an end to dower altogether; but they found this either difficult or impossible, and instead of doing so, suggested this modification of it. However, the result of my opinion on this case, which, I presume, was never contemplated by the framers of this Act, is, that the widow is entitled to her dower." This decision was afterwards affirmed, upon appeal, by the Lords Justices, Turner, L.J., *dubitante*.

4. TUER V. TURNER. 20 Beav. 560.

Husband and Wife—Reversionary Interest of Wife in Lands directed to be Sold—Fines and Recoveries Act.

Sir J. Romilly, M.R., held in this case that a husband and wife can, under the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74, s. 77), make a perfect conveyance of a reversionary interest of the wife in the produce of real estate directed to be sold. "The right to the proceeds of land directed to be sold," said his Honour, "certainly gives a married woman an equitable interest in the land. I must follow the decision of Vice-Chancellor Wood, who seems to have decided the case of *Briggs v. Chamberlaine* (11 Hare, 69), after he had taken time to consider the decision in *Hobbs v. Collins* (De G. & Sm. 293)."

5. GROVES v. WRIGHT. 2 Kay & Johns. 347.

Legacy for Life—Farming Stock—Profits Distinguishable.

A farmer gave his residuary real estate, and his *farmiug stock and implements of husbandry*, and residuary personal estate, to trustees, upon trust to permit his wife to have the full use, benefit, and enjoyment of the same during her life, and after her decease to sell the same, and divide the produce among his children. The widow, after the testator's death, carried on the testator's farm, and took additional land, to farm on lease, in the name of her son. It was held by Sir W. Page Wood, V.C., that the lease of the additional land, and the stock thereon, belonged to the widow's estate, and the stock on the original farm to the estate of her husband. "I cannot," said his Honour, "think that the doctrine relating to things *quæ ipso usu consumuntur*, can have any application to a gift of farming stock. That doctrine applies to a personal use exhausting the subject of the gift. I must regard the intention of the testator. He says nothing, it is true, about carrying on the business; but what could the widow have done with the property so given to her? Could she have sold it? It might have been sold with her consent; but in that case, surely, the income only of the proceeds must have been paid to the widow for life. That is, perhaps, begging the question of the application of the doctrine as to things *quæ ipso usu consumuntur*; but no case has been cited in which the whole of the testator's farming stock having been the subject of the gift, that doctrine has been held to apply. When all the wine in a house is given to one for life, of course the legatee for life may drink it. And there was a case in which carriage-horses were held to come within the same rule; but there the tenant for life had actually used them. Here the farming stock is given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder, or if not, I must suppose that the testator contemplated that she would carry on the business; and if, in the course of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest."

6. BOLD v. HUTCHINSON. 5 De Gex, Mac. & G. 558.

Marriage Articles—Rectification of Settlement—Mistake.

The father of a lady, upon a treaty for her marriage, stated to the plaintiff, her intended husband, that "at the death of himself and his wife, his daughter would have 10,000*l.* at the very least." The articles of settlement afterwards drawn up contained the following clause:—"A covenant is to be drawn up by which Sir W. H. [the father] guarantees that his daughter shall at the decease of both parents have a property of not less than 10,000*l.*" The articles were sent to a person who acted as solicitor for all parties to prepare the settlement. The settlement contained a recital that the intended wife, upon the death of her father and mother, would become entitled to a fortune of 10,000*l.* and upwards; but it did *not contain any express covenant* on the part of the father to make good that sum, as was stipulated for by the marriage articles. It was held by the Lord Chancellor (Lord Cranworth), on a bill being filed by the husband, who had survived his wife, against the executors of the father, that, having regard to the representation made by the father, and the articles, there was sufficient evidence of mistake to authorize the Court to make the settlement conformable with the articles, and that the estate of the father was bound to make up the portion of his daughter to the stipulated sum. After referring to *Legg v. Goldwire* at the end of the case of *Glenorchy v. Bosville* (Ca. t. Talb. 20), his Lordship observed, "I stated my impression that the later authorities had departed from the principles to be found in the older cases. The doctrine *now* is, that when a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, there no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, if there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the Court will reform the settlement, and render it conformable to the real intention of the parties." After stating *Rogers v. Earl* (1 Dick. 294), the facts of which are more fully detailed by Lord St. Leonards in the first volume of his *Vendors and Purchasers* (p. 264), and *Young v. Young*, cited in *Rogers v. Earl*, his Lordship adds: "In these and other cases referred to by Lord St. Leonards, the settlements were rectified, and the later authorities have put the matter upon the true footing; *i.e.* that if it is perfectly

palpable that there has been a mistake on which the settlement has been made, the Court will admit evidence to correct it."

7. MORLAND v. ISAAC. 20 Beav. 389.

Policy—Insurance by Creditor of Debtor's Life—Right to Surplus after Payment of the Debt.

The question sometimes arises, to whom does a policy of insurance—effected by a creditor or grantee of an annuity upon the life of the debtor or grantor—belong upon the death of the latter, or on the payment of the debt or the redemption of the annuity? In *Morland v. Isaac* a tradesman insured the life of his debtor in his own name, and *charged the debtor with the premiums*, but they were never paid by him. On the death of the debtor, it was held by Sir J. Romilly, M.R., that his representatives were entitled to the produce of the policy after payment of the debt and premiums. "This matter," said his Honour, "depends on the contract between the parties. This, however, may either be expressed in writing or by parol, or it may be inferred from the acts and dealings between the parties, from which a contract between them may appear.

"There is a distinction between an assurance to secure a debt and one to secure the payment of an annuity. In the case of an annuity, the grantee is at liberty to effect an insurance or not; it is a distinct contract, which diminishes his profits to the extent of the premiums, the amount of which the grantee cannot recover from the grantor. Thus, if the grantee of an annuity of 100*l.* a year pays for insurance, he cannot charge it against the grantor, but it must come out of his own pocket. The object of an insurance, in the case of an annuity, is to indemnify the grantee against the premature death of the grantor; and in such a case, it requires strong facts to bring one to the conclusion that it was incumbent on the grantee to keep it on foot, and to assign the policy to the grantor upon his redeeming the annuity. The case is different where a creditor insures the life of his debtor. If the creditor pays the premium out of his own pocket, the case is analogous to that of the annuitant; but if he makes the debtor pay them, the case is perfectly different." —(See and consider *Gottlieb v. Cranch*, 4 De G. M. & G. 440.)

8. EIDSFORTH v. ARMSTEAD. 2 Kay & Johns. 333.

Power of Sale by Implication—Charge of Real Estate with Payment of Sum of Money.

Where a testator has charged his real estate with the payment of a sum of money, he must be taken to have given an implied

power of sale to some person to raise the sum required, and the donee of the power must in such case be ascertained from the whole will. In *Eidsforth v. Armstead* a testator had devised his real estate to A. and B., their heirs and assigns, upon trust to pay the rents to the testator's daughter (a married woman), for her separate use for life, and after her decease to the use of the right heirs of his daughter; and the testator thereby charged the real estate with the payment of 700*l.* to his granddaughter. It was held by Sir W. P. Wood, V.C., that A. and B. had a power of sale during the life of the testator's daughter.

9. GRAY v. HAIG. 20 Beav. 219.—HAIG v. GRAY.

Principal and Agent—Destruction of Vouchers—Spoliation—Presumption against Spoliator.

The case of *Gray v. Haig* affords an apt illustration of the maxim, *omnia presumuntur in odium spoliatoris*. There the Messrs. Haig, distillers, appointed Mr. Gray, a commission and general merchant, their agent, for the sale of spirits at a commission. Mr. Gray made profits by the sale of the spirits supplied to him by the Messrs. Haig, for which he had not given credit; he had also made a profit by selling his own spirits mixed with those of the Messrs. Haig, and had destroyed books of account pending litigation commenced by bill and cross bill between the parties for an account. Sir J. Romilly, M.R., held that Mr. Gray, in taking the accounts, was not entitled to 7,000*l.*, the amount of commission, which, by the contract, he would have been entitled to if his conduct had been proper. "The principle," said his Honour, "on which I proceed is that to be found in *White v. Lady Lincoln* (8 Ves. 363), and in *Lupton v. White* (15 Ves. 432), which principle is undoubted; and the only question is, whether the facts of this particular case bring the matter within that principle. The principle may, for the present purpose, be thus expressed: if an agent deal with the goods of his principal as his own, making a profit out of them not accounted for to the principal, and if the agent, by his own conduct, has made it impossible to ascertain what the amount of the profit is which he realized, he shall not be allowed the commission which otherwise, and according to the contract, he would be entitled to claim.

"In the case of *White v. Lady Lincoln* (8 Ves. 363), the agent and manager of the property, who was also the solicitor, kept no regular accounts, or any papers from which such accounts could be made out; he kept all the vouchers which told in his own favour, but no evidence of the receipts in respect of which

he was to be charged. His executors were held not to be entitled, on his behalf, to claim against the principal the charges which, in other circumstances, he would have been entitled to make. Lord Eldon there says, 'With respect to Jackson's demand as auditor, steward, agent, and all, except his bills as attorney, as to all which he was bound to keep accounts of those transactions, I must lay down the rule, that a man, standing in a relation imposing a duty to keep regular accounts, cannot be permitted to make a demand for work and labour in that character with reference to which he has kept no account, which is justified by principle, that ought to be loudly published, that a receiver, who does not pass his accounts regularly, ought not to be allowed any poundage. That principle applies to all these demands, except the bills of costs.'

"In *Lupton v. White* (15 Ves. 432, 439), Lord Eldon laid down, that where an agent or bailiff confounds the property of his principal with his own, he will be charged with the whole, except what he could prove to belong to himself. Lord Eldon says, 'If a man, by his own tortious act, makes it impossible for another to ascertain the value of his property, and that in a transaction in which the former was not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice, that such should not be the state of things between them, by these means preventing the guard which the Court would have effectually interposed, is the argument to be endured, that, as the party so injured cannot distinguish his property, therefore he shall have nothing? That is not the law of this country, as administered in courts either of law or equity.' And after referring to the case of the chimney-sweeper's boy who found a jewel (*Amory v. Delamire*, 1 Stra. 505), and other cases, he says, 'What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole; and the principle goes to the full extent of what is now contended.' By the decree in that case, the defendants, who had wrongfully worked an adjoining mine, and had kept no accounts, though they had entered into an undertaking so to do, were charged with the whole net produce of both mines, except what they should prove to have been taken from their own.

"In this case, the books which would have proved the clear state

of the accounts between the parties have been destroyed by Mr. Gray after the litigation had begun. Upon the evidence before me, I see proof that in several cases Mr. Gray made, on the sale of the goods of his principals, a profit, which he did not give credit for to them. . . . That profits were made by mixing of the spirits, I consider also proved. The amount of those profits nowhere appears in the accounts before me, but would have appeared in the accounts destroyed. The means, therefore, of ascertaining the amount of them are removed by Mr. Gray. The observation I have already made, and which I had so often referred to on this subject, I refer to again;—it is most material in this part of the case, it is that which, in fact, has governed and occasioned my decision throughout the greater part of it; and I repeat again, that I will not send to be tried by a jury a question which is supported by competent evidence, and which, if untrue, could have been disproved by evidence in the possession of one party, which he has taken means to prevent from being made available for the determination of the question by the Court. . . . It cannot be too generally known or understood amongst all persons dealing with each other in the character of principal and agent, how severely this Court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act in all matters relating to such agency for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence by the agent, falls most heavily on himself.”—(See *The Duke of Leeds v. The Earl of Amherst*, 20 Beav. 239.)

10. CALEDONIAN AND DUMBARTONSHIRE JUNCTION RAILWAY COMPANY V. THE MAGISTRATES OF HELENSBURGH. Macqueen, 39.

Railway Company—Contract by Promoters before Incorporation—Whether Binding on Company.

This is a very important case, not only in consequence of the law which it actually decides, but of the law (or, more properly speaking, what has been supposed to be law) which it either condemns or unsettles.

Hitherto it has generally been considered as indisputable that promoters of a company before its incorporation might in equity, though not in law, enter into contracts which would be binding upon the company when incorporated; the Courts of Equity acting upon this principle, that the company when incorporated being entitled to all the rights, are also subject to

all the liabilities of the promoters. These principles were laid down and acted upon by Lord Chancellor Cottenham no less than twenty years ago, in the well-known case of *Edwards v. the Grand Junction Railway Company* (1 My. & Cr. 650), which was afterwards followed up by *Stanley v. The Chester and Birkenhead Railway Company* (8 My. & C. 773) and *Lord Petre v. The Eastern Counties Railway Company* (1 Railway Cas. 462); and moreover in *Hawkes v. The Eastern Counties Railway Company* (5 H. L. Cas. 374), it is laid down by the high authority of Lord St. Leonards, that these cases were "properly" decided.

Now as many contracts must have been entered into by and with the promoters of companies, upon the belief that the law was correctly expounded in the cases before referred to, the decision of the House of Lords in effect declaring that the law as there laid down is incorrect, becomes very important as being likely to lead to much litigation, and to attempts to set aside or treat as nugatory contracts hitherto considered to be binding.

In the above-mentioned case of the *Caledonian and Dumbartonshire Junction Railway Company v. The Magistrates of Helensburgh*, it appeared that the magistrates of Helensburgh entered into an agreement with the provisional committee of the *Caledonian, &c. Railway Company* to allow the company to lay their lines of rails along the streets of Helensburgh, and to take certain ground of the burgh without payment. They also agreed that they (the magistrates) would apply for an Act of Parliament to extend their harbour, and to charge on the harbour dues 3,000*l.* to be lent to them by the company. The provisional committee, on their part, bound the company to pay all the past and future expenses of enlarging the harbour, and of applying for the Harbour Act; and that 3,000*l.* only of such monies should form a charge on the harbour dues. The magistrates of Helensburgh duly obtained their Harbour Act; the committee also obtained their Railway Act; but the agreement was not incorporated in or noticed by such Act. It was held by the House of Lords, that the company was not bound by the contract of the provisional committee, especially as the act to be done was not an act for the effecting of which the company, when established, could lawfully devote its funds. The Lord Chancellor, in his elaborate judgment, said, that a company is a body different from its projectors in substance as well as in form, and that no injustice can arise to those who have dealt with projectors, for against them, and all under whose authority they acted, there would be a clear right of action if the company did not fulfil the engagements which they had contracted that

it should perform; and that was surely all which those who had dealt with the projectors could claim as their right. For those reasons his Lordship was of opinion that on *principle* there was no ground for holding that a company was bound by any engagement made by those who obtained the Act of incorporation, unless those engagements were embodied in the terms of the Act itself.

His Lordship, in considering how far the question was settled by *authority*, after reviewing the case of *Edwards v. The Grand Junction Railway Company*, *Stanley v. The Chester and Birkenhead Railway Company*, and *Lord Petre v. The Eastern Counties Railway Company*, observed that in all these cases Lord Cottenham clearly considered that the company was bound by the contract of the promoters. His Lordship thought that such doctrine rested on no sound principle. "I am, however," added his Lordship, "relieved from the necessity of coming to any positive decision on this point, because I think the present case is distinguishable from those decided by Lord Cottenham, and so, that even *if those authorities are to be held binding*, still they do not govern the present case.

"In all the cases before Lord Cottenham, the contracts which he held to be binding on the company were *contracts to do things warranted by the terms of the incorporation*. . . . But here, what the projectors of the railway company contracted to do is to apply the funds raised under legislative authority for the purpose of the railway to an object foreign from that of the railway; namely, the construction of a pier and harbour at Helensburgh. It is vain to say that such an application of the funds might, if the projected branch line from Dumbarton to Helensburgh had been made, have been beneficial to the railway company. It is a sufficient answer to such a suggestion, that it is not the purpose for which the shareholders subscribed their money; and there are numerous authorities, both in England and Scotland, to show that such a diversion of the funds from their statutable destination cannot be permitted. Any shareholder in a railway company may, by legal proceedings, prevent its directors from applying its funds to a purpose not authorized by the Act of incorporation; and it is inconsistent with such a principle to hold that the company can be compelled, even in pursuance of the contracts of its own directors, and much more in pursuance of engagements entered into by its projectors before it had any existence, to do that which it can only do by being guilty of a breach of duty towards the shareholders. . . . I am therefore of opinion that, even supposing the law to be—and in this respect the laws of England and Scotland are the same—that in respect of con-

tracts entered into by the projectors of a company, that the company, when formed, shall do acts within the scope of their powers in a particular mode or on specified terms, the company is bound; still that doctrine does not apply here, where the act to be done was not an act for the effecting of which the company, when established, could lawfully devote its funds."

11. ARMSTRONG v. BURNETT. 20 Beav. 424.

Specific Legacy of Shares—Whether Legatee or general Personal Estate liable for future Calls.

A question sometimes arises whether a specific legatee of shares in any company takes them subject to the liability of paying all future calls, or whether such calls are to be paid out of the general personal estate of the testator. In the above-mentioned case of *Armstrong v. Burnet*, Sir John Romilly, M.R., after an elaborate examination of the authorities, has clearly laid down the principles by which the Court should be guided in determining such questions. In the above-mentioned case of *Armstrong v. Burnet*, a banking company was established in 1836. By the deed of settlement, 5*l.* per share was payable immediately, and the directors were empowered at any time to make a further call of 5*l.*; and on non-payment the shares might be forfeited. The shares were transferable, and on transfer the former proprietor was released. Legatees and executors might sell, but were not to be members until a transfer to them, and until then were not entitled to the current dividends. The shareholders thereby covenanted to observe the clauses of the deed. A shareholder died in 1843, having specifically bequeathed his shares to infants. The executors, in 1845, transferred the shares into their own names, and they assented to the legacies. Afterwards, in 1848, the further call of 5*l.* per share was made. It was held by Sir John Romilly, M.R., that it was payable by the legatees, and not out of the testator's residuary estate. "Although," said his Honour, "it may not alone dispose of the whole question, still an important consideration in the case is, whether the liability of the testator's estate to the payment of this call did subsist at the time when the call was made. I have not found any case in which the general personal estate of the testator has been compelled to bear this payment, unless where such liability subsisted at the time when the call was made." After referring to *Blount v. Hipkins* (7 Sim. 43), *Jacques v. Chambers* (2 Coll. 435; 4 Railw. Cas. 499), *Clive v. Clive* (Kay, 600), *Marshall v. Holloway* (5 Sim. 196), *Wright v. Warren* (4 De G. & Sm. 367), *Barry v. Harding* (1 J. & L. 475),

Fitzwilliams v. Kelly (10 Hare, 266), his Honour added: "I am disposed to believe that the distinction which regulates these cases is involved in the answer to this question,—*Was the subject-matter of the testator's bequest complete in itself when the bequest took effect?* In *Blount v. Hipkins* and *Jacques v. Chambers*, the testator bequeathed shares in a company *to be formed*; the shares and the interest of the testator in them were not complete, and therefore the liability he was under to complete his interest therein fell on his general personal estate. This seems to me also to be the principle of the decision in *Marshall v. Holloway*, and also in *Fitzwilliams v. Kelly*. Where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons unconnected with it, as in the case suggested of an insurance company, I think that the future calls fall on the legatee, and not on the general personal estate; but where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then I think that his general personal estate is applicable for that purpose.

"To apply this to the present case: if the transfer had not taken place to the executors, I should still be of opinion that the burden of paying this call must fall on the legatees; but if this call had been contemplated before the death of the testator, and had been required to make his interest in that share complete (as, for instance, if the further call were required before the company could be worked, or before any dividend could be paid), then I should have been of opinion that the general personal estate of the testator ought to have borne the expense of these calls. This distinction may possibly give rise to some difficulty and some nicety in some cases, but not, I think, an insurmountable one. Whether, however, this be so or not, it appears to me to be a reasonable principle, and one by which all the decisions on this subject may be reconciled."

12. MORLEY v. MORLEY. 5 De Gex, Mac. & G. 610.

Tenant for Life Discharging Bond Debts—Presumption—Statute of Limitations.

When an *incumbrance* is paid off by a person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to show a contrary intention, the presumption is, that he meant to do that which, in law and equity, he might have done, namely, to keep it alive for his own interest, and that the omission was a mere oversight; in

such case the Court of Chancery will supply that omission by giving him, or by causing the proper parties to give him, if necessary, an assignment, or an instrument, which shall put him in the same position as if he had obtained it for himself.

The same presumption, however, does not arise from the payment, by a tenant for life, of the bond debts of the testator from whom he derived his estate, which debts, even if assigned, only place him in the same position as any other bond creditor. Thus in the above-mentioned case of *Morley v. Morley*, a testator, being indebted by bond, devised real estates to his son for life, with remainder, subject to a term for the payment of legacies, to his grandson in tail, and died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life and his assignee for value filed their bill against the tenant in tail and the legatees, alleging that the tenant for life had paid off the bonds, and seeking to stand in the place of the obligees as against the inheritance. The tenant in tail pleaded the Statute of Limitations, the other legatees did not. It was held by the Lord Chancellor, affirming the decision of Sir John Stuart, V.C., that the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, and that the bonds themselves being more than twenty years old, the presumption was, that they were satisfied.

13. DAVIS V. EARL OF DYSART. 20 BEAV. 405.

Title-deeds—When Bill may be Filed by Remainderman for Production of.

Any person entitled to a vested remainder in an estate, or his mortgagee (who stands in his place), may maintain a bill in equity against the tenant for life, for the *sole purpose* of requiring the production and inspection of the title-deeds and documents relating to the estate, in the possession of the tenant for life, in order to enable the remainderman to deal with his property as he may consider most for his advantage; and if it be suggested that the purpose for which the documents are required is an improper one, the burden of proof of this lies on the person resisting the production. Where, however, there is a probable cause of litigation with regard to the title of the remainderman, he cannot compel such production. Thus in the above-mentioned case of *Davis v. Earl of Dysart*, the mortgagee of A. (an alleged remainderman) filed a bill against B. (the alleged tenant for life), for the mere production of the title-deeds. B. set up a *bond fide* objection that A.'s estate had become forfeited; and also, that by the terms of the mortgage-deed, the estates in question were not comprised therein. The assignees

of A. (who had become bankrupt), though interested in the latter question, were not parties to the suit. Sir J. Romilly, M.R., dismissed the bill with costs. "The Court," said his Honour, "cannot give the plaintiff the relief he seeks, without deciding in his favour various collateral questions of considerable nicety and difficulty as to the right to the estate; questions not now properly ripe for decision, and which will, or may, hereafter have to be tried at law or in this court. It is in effect to decide incidentally these questions in a manner to conclude no one, but in a way which may prejudice rights hereafter to arise and to be determined. In a clear case, the plaintiff is entitled to such production, but if the case be not clear, the Court will not give him that relief through the incidental decision of collateral points, but will leave him to establish his right to the estate, at the proper time and in the proper manner."

14. FORSHAW V. HIGGINSON. 20 Beav. 485.

Trustee—When and upon what Terms he can Retire from the Trust.

In this case the Master of the Rolls has laid down some very useful rules upon a subject very bare of authority; *viz.* how far a trustee is justified in retiring from acting in the trusts.

"A trustee," said his Honour, "cannot from mere caprice retire from the performance of his trust, without paying the costs occasioned by that act. Any circumstances, however, arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually."

A trustee desirous of retiring from the trust; on the ground of want of confidence in his co-trustee, cannot properly get rid of the trust by procuring the co-trustee, in whom he felt no confidence, to appoint in his place another person, not only not sanctioned, but opposed and objected to by the *cestuis que trust*; "for although," said his Honour, "I do not say he would have been liable for any misconduct that might afterwards have been committed by the trustees, yet the Court would certainly have greatly disapproved of such a proceeding, and he would have rendered himself liable to great risks, such as no trustee should be called upon to incur."

In *Forshaw v. Higginson* a trustee, for reasons of a private nature not arising out of the trusts, not feeling confidence in his co-trustee, was desirous of retiring from the trusts. The *cestui que trust* refused to give him a release. It was held by

Sir J. Romilly, M.R., that he was justified in instituting a suit asking to be discharged from the trusts, and offering to account, inasmuch, as although he was desirous of retiring, from private circumstances, he would not have been justified in simply retiring and getting his co-trustee, in whom he had no confidence, to appoint a new trustee. The trustee was also allowed his costs. His Honour, however, said, as in this case the desire of the trustee to retire arose out of private circumstances, and not out of the administration of the trust, that if on the application of the trustee to be discharged, his *cestui que* trust had said You must pay the costs of the appointment of the new trustees, which would have been the mere costs of an indorsement on a deed, and he had refused to do that, he should not have supported the plaintiff in instituting a suit, by giving him the costs thereby occasioned.

II.—POINTS DETERMINED IN THE COURTS OF COMMON LAW.

By ALEXANDER PULLING, Esq., *Barrister-at-Law.*

COURTS.	REPORTS.
Queen's Bench	{ 18 Q. B. Parts 3, 4. ¹ 5 Ellis & Bl. Part 3.
Common Bench	{ 17 Common Bench, Part 4. 18 Common Bench, Part 1-2.
Exchequer	11 Exchequer, Parts 3, 4.

1. Agent—Revocation of Authority of—Authority coupled with an Interest. 2. Bankrupt—Assignment of Estate and Effects for Benefit of Creditors—Execution of Power to seize future Effects. 3. Bill of Exchange—What Words constitute a Bill of Exchange or a Promissory Note. 4. Bill of Exchange—Proof of Payment by Acceptor. 5. Carrier—Packed Parcels—Inclosures—Refusal to Carry—Damages—Charge for Small Parcels. 6. Covenant to put in Repair and to Repair—What runs with the Land—Covenant to yield up in Repair—Mutual Conditions—Pleading—How to aver Breach of Covenant to Repair according to Custom of Country. 7. County Court—Appeal—Absence of Evidence to justify the Verdict. 8. Defamation—No Action lies against a Man for a Statement made on

¹ These two numbers, containing the cases in Easter and Trinity Term, 1852, have only just appeared.

Oath in a Court of Justice. 9. Devise—Stat. 7 Wm. 4 & 1 Vict. c. 26, s. 26—When Leasehold Estates will pass under a General Devise of Realty. 10. Ejectment—Common Law Procedure Act, 1852—Right of Party to come in and Defend. 11. Equitable Defence—Mortgage—Covenant—Plea on Equitable Grounds—Replication on Equitable Grounds—Account in Equity. 12. Equitable Replication—Common Law Procedure Act—Power of Court of Common Law to give Relief on Matters affecting written Agreement without the Agreement being reformed. 13. Evidence—Parol Evidence to supply Omission of Date in Written Contract. 14. *Habeas Corpus* by Husband to regain Custody of Wife. 15. Information—Joinder of Counts—Arrest of Judgment. 16. Joint-Stock Company—Right of Subscribers to Shares to have Certificates—Executing Deed of Settlement. 17. Libel—Secondary Evidence—Preliminary Question of Fact. 18. Mandamus to East-India Company to pay Salary of a Military Officer. 19. Practice—Common Law Procedure Act, 1854—Pleading—Equitable Defence—Mistake in drawing up Contract in Foreign Language. 20. Practice—Certificate for Special Jury—Meaning of the Term “immediately” in the 6 Geo. 4, c. 50. 21. Practice—Common Law Procedure Act, 1854—Garnishment—Costs. 22. Practice—Debt above 20*l.* reduced below 20*l.* by Payment after Action—Judgment—Execution—*Ca. sa.* for the whole Amount—Irrregularity. 23. Railway Company—Right of, to exclude Vehicles from their Station-yard. 24. Stamp—What sufficient Evidence to raise a Presumption that an Instrument, not produced, was duly stamped, so as to let in Secondary Evidence of its Contents. 25. Statutory Privilege to interfere with Property, first making Satisfaction—Continuance of Privilege after Expiration of the Power, as limited by Statute, to make the Satisfaction. 26. Vendor and Purchaser—Measure of Damages where the Vendor fails (without fraud) to make a good Title.

1. SIMPSON V. LAMB. 17 Com. B. 603.

Agent—Revocation of Authority of—Authority coupled with an Interest.

The defendant employed the plaintiff, a clerical agent, to offer an advowson for sale, upon an understanding that, in the event of a sale being effected through the plaintiff's agency, the latter should receive a commission of 5*l.* per cent. upon the amount of the purchase-money. The defendant afterwards, without communicating with the plaintiff, sold the living himself. In an action charging a wrongful revocation of the authority, the Court of Common Pleas held that, in the absence of evidence of expense or liability incurred by the plaintiff, he was not entitled to recover anything.

Quære, whether the wrongful revocation of the authority to sell was put in issue by “not guilty”?

2. CARR V. ACRAMAN. 11 Exch. 566.

Bankrupt—Assignment of Estate and Effects for Benefit of Creditors—Execution of Power to seize future Effects.

In October, 1852, England, a trader, assigned to the plaintiff all his household furniture and effects then on his premises, as a

security for money lent, with a power, in default of payment, to seize and take possession of the property thereby assigned, and all other goods, chattels, and effects which might be found on the premises. In January, 1855, England assigned all his estate and effects to trustees, for the benefit of the creditors. In the following February the plaintiff seized the goods, &c., and in March a fiat in bankruptcy issued against England, the act of bankruptcy being the above assignment of his estate and effects to trustees. In an action by the plaintiff against the assignees for selling the goods so seized by him, the Court of Exchequer held, that though the assignment by England of his estate and effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to the plaintiff, and so defeated his title, which would otherwise have been valid by the seizure.

3. LLOYD V. OLIVER. 18 Q. B. 471.

Bill of Exchange—What Words constitute a Bill of Exchange or a Promissory Note.

An instrument was drawn in the following form:—"Two months after date I promise to pay Mr. T. R. Lloyd, or order, 99l. 15s. H. Oliver." Underneath was written, on the left hand of the instrument, "I. E. Oliver" (defendant). Across it the defendant wrote, "Accepted, payable S. and Co., bankers, London. E. Oliver."

The Court of Queen's Bench held, that the instrument might be sued upon as a bill of exchange drawn by H. Oliver upon, and accepted by, defendant. Lord Campbell, C.J., intimated that such an instrument would be good as a bill of exchange, as against the drawer, even before acceptance; and Mr. Justice Crompton observed that equivocal instruments of this kind, possessing the character both of promissory notes and bills of exchange, may be treated as either.

4. BELL V. BUCKLEY. 11 Exch. 631.

Bill of Exchange—Proof of Payment by Acceptor.

J. Thornley kept an account at the National and Provincial Bank at Liverpool, who discounted for him a bill for 365l., drawn by him upon, and accepted by, the defendant. The day before the bill became due, Thornley went to the bank, who held another bill of his for 870l., due that day, and requested the manager to "retire" the two bills by discounting two others of similar amounts. The manager consented, and Thornley

gave him a bill for 365*l.*, purporting to be accepted by the defendant, to "retire" the bill of that amount. The bank discounted the second bill for 365*l.*, and placed the proceeds to the credit of Thornley, minus the discount, and they got back from their London agent the first bill for 365*l.*, with the acceptance cancelled. Several thousand pounds had been subsequently paid by Thornley into the bank. It afterwards turned out that the acceptance of the second bill for 365*l.* was forged by Thornley. In an action by the bank against the defendant, as acceptor of the first bill, the Court of Exchequer held that the facts did not support a plea of payment of the bill by Thornley.

5. *CROUCH V. GREAT NORTHERN RAILWAY COMPANY.*
11 Exch. 742.

Carrier—Packed Parcels—Inclonures—Refusal to Carry—Damages—Charge for Small Parcels.

In this case, where the right of railway companies to make extra charges for the carriage of *packed* parcels came in question, the Court of Exchequer held that a railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels all belonging to one person. The defendants having refused to carry, at the ordinary rate, packed parcels tendered by the plaintiff, a carrier, whereby he was obliged to send them by a more circuitous route and at a greater expense, the Court held that he was not entitled to recover damages for an alleged loss of business.

The fourteenth section of the Great Northern Railway Company's Act (13 & 14 Vict. c. 61) provides that the company may charge for the carriage of parcels not exceeding five hundred-weight, any sum they may think fit. Mr. Baron Alderson intimated that the Act must mean "such reasonable charges as they think fit."

6. *MARTYN V. CLUE.* 17 Com. B. 661.

Covenant to put in Repair and to Repair—What runs with the Land—Covenant to yield up in Repair—Mutual Conditions—Pleading—How to aver Breach of Covenant to Repair according to Custom of Country.

Declaration in covenant by lessor against assignee of lessee set forth a covenant by lessee, for himself, his heirs, executors, administrators, and assigns, that he and they would take the premises from, &c., for fourteen years, and would pay the rent; and that lessee, his executors and administrators, would, at his

and their own cost, repair, and put into tenantable repair, the demised premises, he, the lessee, having been already paid by lessor 400*l.*, the valued amount of the then present dilapidations, exclusive of rough timber, but not on the stem, which was to be allowed by lessor, his heirs and assigns, on the demised premises; and that, after the premises should have been put into such repair, lessee, his executors, administrators, and assigns, would, at his and their proper cost, from time to time repair, and keep in tenantable repair, the demised premises, being allowed rough timber, but not on the stem, upon the demised premises; the timber to be fetched and carried at the expense of lessee, his executors, administrators, and assigns: and the said premises so repaired and kept together, with the possession of the said premises, should yield up to lessor at the expiration of the said term; and should not cross-crop the land, nor commit any waste, &c.; but should cultivate the land in good husbandlike manner, and according to the custom of the country. The count then averred entry of the lessee, and assignment by him to defendant, who entered, and was possessed until the expiration of the term.

Breach—That although lessor, from the time of making the lease till the assignment, was ready and willing at all times to provide for lessee, and, from the assignment till the expiration of the term, was ready and willing to provide for defendant and lessee, on the demised premises, sufficient rough timber, not on the stem, to enable them to repair, and put into tenantable repair, the said premises; and although lessee did not, before the assignment, or at any time, repair, or put into repair, the said premises, yet defendant did not, after the said assignment, repair, or put into repair, the said premises, nor yield up the same well repaired at the expiration of the term; but suffered them to be ruinous, &c., for want of repair; and so left them at the expiration of the term. Also that defendant, after the assignment, cross-cropped the land, and did waste, and used and cultivated the land in a bad and unhusbandlike manner, and not according to the custom of the country.

Defendant pleaded, among other pleas, as to suffering the premises to be ruinous, and out of repair, and so leaving them, that lessor did not at any time, from the assignment till the expiration of the term, provide on the premises sufficient rough timber, not on the stem, to enable defendant to repair, nor any rough timber whatever; and he demurred specially to the declaration. Plaintiff demurred to the plea.

Held, that the declaration was good; for,—

1. The covenant to put in repair ran with the land, and

bound the assignee, though the lessee, in this part of the deed, covenanted only for himself and his executors and administrators; and that the payment of 400*l.* to the lessee was no ground for construing this covenant as limited to him personally.

2. It was sufficient, on this record, to aver that the lessor was always ready and willing to furnish timber, without stating that he actually did furnish it.

3. A covenant to yield up in repair at the end of a term runs with the land, and binds an assignee, though not named.

4. Breach of a covenant to cultivate according to the custom of the country is sufficiently averred by stating that defendant did not so cultivate, without specifying instances.

Held also, that the plea was bad, for that the condition precedent to the defendant's obligation to repair was sufficiently performed if he was ready and willing to supply timber when required.

7. **BRITISH INDUSTRY LIFE ASSURANCE COMPANY V. WARD.**
17 Com. B. 644.

County Court—Appeal—Absence of Evidence to justify the Verdict.

Where a County-Court judge, in stating a case for the opinion of this Court, under the 13 & 14 Vict. c. 61, s. 14, sets out evidence which shows a total absence of foundation for the conclusion at which he has arrived, the Court will reverse his decision.

8. **REVIS V. SMITH.** 18 Com. B. 126.

Defamation—No Action lies against a Man for a Statement made on Oath in a Court of Justice.

This was an action for a libel contained in an affidavit by the defendant in some proceedings in Chancery; the declaration alleging the libellous statement to have been made "falsely and maliciously, and without any reasonable or probable cause."

The declaration being demurred to, all the authorities were cited in the argument before the Common Pleas, and the learned judges unanimously decided in favour of the demurrer, and that the action was without principle or analogy to sustain it, tending to trammel witnesses in giving evidence in courts of justice.

9. WILSON v. EDEN AND OTHERS. 18 Q. B. 474.

Devise—Stat. 7 Wm. 4 & 1 Vict. c. 26, s. 26—*When Leasehold Estates will pass under a General Devise of Realty.*

Sir Robert Eden, by his will, made in 1815, but confirmed by a codicil in 1841 (see stat. 1 Vict. c. 26, s. 34), after directing payment of his debts, and funeral and testamentary expenses, and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed "all the rest, residue, and remainder" of his "personal estate, goods, and chattels, whatsoever and wheresoever," to his brother, Mr. Morton Davison, "absolutely, to and for his own use and benefit." He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being, at or near," &c., in the county, &c.; "and a parcel of land purchased by me" of M. L., at, &c., in the county, &c.; "and all other my real estates in the said counties of," &c., "and elsewhere in Great Britain; and all my estate and interest therein," to trustees, to hold the same (subject to the said annuities) to the use of the said Morton Davison for life, remainder to the issue of the said Morton Davison in tail male; in default of such issue, to Sir W. Eden and his heirs.

At the time of making his will, and at his decease, testator was possessed of freehold estates in both the said counties, and of lands held under certain church leases in one of them, which had been, according to the usual practice of the lessors, renewed every seven years.

These leaseholds were distinct from, but near, and in some places contiguous to, the freeholds. Some of them were let and occupied with the freeholds, at undivided yearly rents; cottages, ornamental and otherwise, were built upon part; and on part were buildings occupied by labourers employed upon the freehold estates.

On a case stated from the Court of Chancery, the Court of Queen's Bench held that, under stat. 7 Wm. 4 & 1 Vict. c. 26, s. 26, the leasehold estates in question passed under the general devise of the realty, there being no contrary intention apparent on the will.

10. THOMPSON v. TOMKINSON. 11 Exch. 442.

Ejectment—Common Law Procedure Act, 1852—*Right of Party to come in and Defend.*

This was an action of ejectment, in which application was made to the Court of Exchequer to allow William Gilbert, who

had himself recovered judgment in ejectment for the property in dispute upon a forfeiture of a lease, but had not actually obtained possession, to come in, under stat. 15 & 16 Vict. c. 76, s. 172, and defend the action; but the Court refused the rule, on the ground that no writ of possession had been executed, and *non constat* that the applicant might ever get possession.— (See *Croft v. Lumley*, 4 E. & Bl. 274, 614.)

11. MARCON V. BLOXAM. 11 Exch. 586.

*Equitable Defence—Mortgage—Covenant—Plea on Equitable Grounds—
Replication on Equitable Grounds—Account in Equity.*

In this action, which was brought on a covenant in a mortgage-deed, by Susannah Arnold (the defendant's testatrix) and Henry Arnold, for payment of 2,800*l.* and interest, the defendant pleaded, on equitable grounds, setting out the deed, which recited the will of George Arnold, whereby he bequeathed (*inter alia*) his furniture, plate, books, pictures, &c., subject to the payment of his debts, to Susannah Arnold for life, and after her decease, to Henry Arnold. The deed also recited a decree of the Court of Chancery, by which it was ordered that the furniture and other articles aforesaid should be sold, and the proceeds paid into court; that the books and pictures had been valued at 2,050*l.*, at which sum Henry Arnold had agreed to purchase them; and that to enable him to do so, the plaintiffs had agreed to lend him 2,050*l.*, and a further sum of 749*l.* 5*s.*, upon the security of the joint and several covenant of Susannah Arnold and Henry Arnold, and an assignment (*inter alia*) of the furniture, &c. The deed then witnessed that Susannah Arnold and Henry Arnold assigned (*inter alia*) the furniture, plate, pictures, and books, to the plaintiffs as security for 2,800*l.*, with a power of sale in default of payment, the plaintiffs to hold the proceeds of sale in trust to pay the expenses, and then to apply the monies in satisfaction of the principal and interest due. The plea then averred that the plaintiffs sold the furniture, &c., and received sufficient to satisfy the principal and interest, which they ought to have applied accordingly. The plaintiffs replied on equitable grounds, except as to 2,085*l.* 18*s.* 4*d.*, the parcel of plaintiffs' claim, that the valuation of the plate and furniture was not complete at the time of the execution of the deed, and that they were afterwards valued at 706*l.* 8*s.*, at which sum Henry Arnold agreed to purchase them; that by an indenture between Henry Arnold and the plaintiffs, after reciting (*inter alia*) that 2,800*l.* and interest was due to the plaintiffs; that Susannah Arnold had died, and that, in order to enable Henry Arnold to pur-

chase the plate and furniture, the plaintiffs had agreed to lend him 600*l.*, Henry Arnold assigned to the plaintiffs all the property mentioned in the deed, to secure the 2,800*l.* and interest, and 600*l.* and interest, together with a power of sale. The replication then stated that the plaintiffs sold the plate and furniture, and, after expenses, realized 1,127*l.* 15*s.*; and that there was due, under the indenture, in respect of the 600*l.* and interest, 638*l.* 5*s.* 6*d.*; that Henry Arnold, not having paid into the Court of Chancery the 706*l.* 8*s.* for the purchase of the plate and furniture, the plaintiffs, in order to pay the same, retained, out of the money realized by the sale, 706*l.* 8*s.*; and that the sums of 638*l.* 5*s.* 6*d.* and 706*l.* 8*s.*, being deducted from the proceeds of the sale, the plaintiffs never realized more than 2,088*l.* 18*s.* 4*d.*, which was only sufficient to pay a part of the plaintiffs' claim in the declaration. The Court of Exchequer held that, in taking the account in equity, the plaintiffs were not entitled to deduct from the amount for which the property sold, the 600*l.* and interest, for that would, in effect, be to tack the mortgage of 2,800*l.* to the mortgage of 600*l.*, which could not be done, since the equity of redemption was in different persons; but that the plaintiffs were entitled to deduct the 706*l.*, since the whole property was not in their possession, and they had no right to sell it until the 706*l.* 8*s.* was paid into court.

12. WOOD V. DEVANIS. 11 Exch. 493.

Equitable Replication—Common Law Procedure Act—Power of Court of Common Law to give Relief on Matters affecting written Agreement without the Agreement being reformed.

This was an action on a policy of assurance in the Equity and Law Life Assurance Society. The policy made the plaintiff's proposal and declaration as to the assured's life a part of the contract, and avoided the contract, if these were untrue. The plea alleged that the plaintiff's said declaration contained a certain false and untrue statement. The plaintiff in his replication set up the defendants' prospectus that every policy should be indisputable, except in cases of fraud, and negatived the fraud in the plaintiff's said proposal and declaration. The rejoinder did not deny these facts, but merely alleged that the defendants did not make such representation at the time of effecting the policy, or at any other time except by the prospectus. To this there was a demurrer, and the Court of Exchequer unanimously held the rejoinder bad, and the replication setting up the prospectus good.

* * * *Jacobs v. Richards*, 18 Beav. 303, and *Graham v. Ackroyd*, 10 Han. 192, show that it is an established rule of Equity, that when there is a valid instrument, the Court will give effect to it; and if either party relied on something not included in the instrument, he must get it reformed. The Court in the first instance decided that the prospectus relied on in the replication could be set up without the written agreement being reformed, the prospectus being set up under circumstances which rendered it inequitable that such a defence should be pleaded.

13. *DAVIS v. JONES.* 17 Com. B. 625.

Evidence—Parole Evidence to supply Omission of Date in written Contract.

This was an action for a wrongful distress; and the right of the plaintiff to distrain turned on a written agreement, by which the plaintiff agreed to take certain premises for three years, at a rent of 30*l.*, payable quarterly. The instrument was silent as to the time from which the rent was to commence, and there was evidence that the date was filled in after the execution by the defendant; and also that, contemporaneous with the execution, a parole agreement was entered into, by which the rent was only to commence from the completion of certain repairs. The Court of Common Pleas held, in compliance with *Murray v. Earl of Stair* (2 B. & E. 82), that such parole evidence was admissible.

14. *REG. v. LEGGATT.* 18 Q. B. 781.

Habeas Corpus by Husband to regain Custody of Wife.

This was a rule calling on Mr. Leggatt, at the instance of Mr. Sandilands, to show cause why a *habeas corpus* should not issue to bring up the body of the applicant's wife, who was not on good terms with the applicant, and voluntarily resided with Mr. Leggatt, her son. On cause being shown, the Court of Queen's Bench discharged the rule, holding that where a wife is, by her own desire, living apart from her husband, and is under no restraint, the Court will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody.—(See *Re Cochrane*, 8 Dowl. 630; and *Rex v. Mead*, 1 Burr. 542.)

15. *ATTORNEY-GENERAL v. RUCK.* 11 Exch. 763.

Information—Joinder of Counts—Arrest of Judgment.

This was an information against the defendants, under the Customs Act, 8 & 9 Vict. c. 87, charging, in the three first counts,

five defendants with several offences on different days; and in the four following counts, it charged four of those defendants, together with four others, with similar offences on other days. A verdict having been found for the Crown, the Court of Exchequer held that there was no ground for arresting the judgment, for the defect (if any) might be cured by the mode in which the judgment was entered up.

16. **WILKINTON V. ANGLO-CALIFORNIAN GOLD-MINING COMPANY.** 18 Q. B. 728. **STEWART V. SAME,** 18 Q. B. 736.

Joint-Stock Company—Right of Subscribers to Shares to have Certificates—Executing Deed of Settlement.

The first of these cases was an action by the plaintiff, a subscriber for twenty shares in the defendants' company, against the defendants, for refusing to give the plaintiff certificates of such shares. The defendants pleaded that the plaintiff had not executed the deed of settlement, or any deed referring thereto; and on demurrer to this plea, the Court of Queen's Bench held the plea good, and that a subscriber for shares in a joint-stock company, completely registered under stat. 7 & 8 Vict. c. 110, is not entitled to certificates under sect. 51, till he has executed the deed of settlement, or a deed referring thereto.

In the second case, which was also an action for refusing to give the plaintiff certificates of his holding shares, the declaration only alleged a willingness on the plaintiff's part to execute the deed of settlement.

The deed of settlement contained (*inter alia*) a rule that the share of any subscriber for part of the company's capital, who should not execute the deed within three months from its date, should be forfeited if the directors think fit, no provision being made for giving the subscriber notice to execute, or notice of intention to enforce the forfeiture. The plaintiff was a subscriber, but his shares were declared forfeit under the rule, without any such notice, and the Court of Queen's Bench held that the action could not be maintained.

17. **BOYLE V. WISEMAN.** 11 Exchequer, 360.

Libel—Secondary Evidence—Preliminary Question of Fact.

It is the province of the judge at *Nisi Prius* to decide all preliminary questions of fact upon which the admissibility of the evidence depends. This was an action of libel, for certain libels published in the *Univers*, and afterwards in the *Tablet*

and another paper. The plaintiff, in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant, a document was produced as the original, and Mr. Baron Platt having, at that stage of the cause, refused to receive the evidence, the Court of Exchequer held that they were bound to hear the evidence on both sides, and to decide whether the document offered was the original or not; and that, if it was, the secondary evidence was inadmissible.

18. *EX PARTE NAPIER.* 18 Q. B. 692.

Mandamus to the East-India Company to pay Salary of a Military Officer.

This was a rule for a mandamus to the East-India Company to pay Sir Charles Napier a certain sum of money, claimed by him as due for pay whilst an officer commanding forces of her Majesty and the East-India Company in India, and the Court of Queen's Bench refused the rule, holding that an officer has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the Company to discharge arrears, though he has always received his pay from the Company, and their practice has been to discharge it monthly.

"A legal obligation," said Lord Campbell, "which is the proper substratum of a mandamus, can only arise from common law, from statute, or from contract. Of course the obligation here contended for cannot arise from the common law, and is not vested in contract. We have therefore to see whether there are any enactments of the Legislature by which it can be supported. It was not contended that an officer in the Queen's army at home could apply to us for a mandamus on the ground that his pay is improperly withheld from him, and the application is entirely founded on certain statutes respecting the East-India Company and the government of the dominions belonging to the Crown in India." His Lordship then commented on these statutes (33 Geo. 3, c. 52; 53 Geo. 3, c. 155; 4 Geo. 4, c. 81; 3 & 4 Wm. 4, c. 85; 7 Wm. 4 & 1 Vict. c. 47; 3 & 4 Vict. c. 37), and held that they created no such legal obligation.

. See *Gibson v. East-India Company*, 5 New Cases, 26; *Gidley v. Lord Palmerston*, 3 Brod. & B. 275; *Rex v. Directors of East-India Company*, 4 B. & Ad. 530; *Rex v. Lords of the Treasury*, 4 Ad. & E. 286; *Reg. v. Lords of the Treasury, Re Smyth*, 4 Ad. & E. 976; *Reg. v. Same, Re Hand*,

4 Ad. & E. 984; Reg. v. Commissioners of Woods and Forests, 15 Q. B. 772; Reg. v. Lords of the Treasury, *Re Queen Dowager's Annuity*, 16 Q. B. 857.

19. *Perez v. Oleaga*. 11 Exchequer, 506.

Practice—Common Law Procedure Act, 1854—Pleading—Equitable Defence—Mistake in drawing up Contract in Foreign Language.

This was an action for the non-performance of an alleged agreement to load a ship for a voyage to Manilla, with a guaranteed freight of not less than 5,500*l.*, and the Court refused to allow the defendant to plead, by way of equitable defence, that the real contract was, that the ship should earn freight at such a rate per ton, that, if filled, she would obtain 5,500*l.*, and that by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly understood, it was described as an absolute guarantee that the ship should have a freight of 5,500*l.* *Quere*, whether the subject-matter of the proposed plea might be given in evidence under a denial of the contract.

20. *Leech v. Lamb*. 11 Exchequer, 437.

Practice—Certificates for Special Jury—Meaning of the Term "immediately" in the 6 Geo. 4, c. 50.

This cause being tried by a special jury at the Spring Assizes, 1855, a verdict was found for the defendant. The defendant's counsel then asked the judge to certify for the special jury, and he consented; but the associate omitted to indorse the certificate on the record. In the following term, a rule *nisi* was obtained for a new trial, which was not disposed of until Trinity vacation. On taxation of costs, it was discovered that the certificate was not indorsed on the record; and on application to the judge on the 14th of August, he signed the certificate. The Court of Exchequer held that the certificate was too late, and the Court set it aside.

21. *Johnson v. Diamond*. 11 Exchequer, 431.

Practice—Common Law Procedure Act, 1854—Garnishment—Costs.

The plaintiff having obtained judgment against one Courtis, obtained a rule to proceed against Diamond, as garnisher, under

the 64th section of the "Common Law Procedure Act, 1854." A writ accordingly issued, and the plaintiff having declared, the defendant demurred to the declaration, and obtained judgment without mention of costs. The Court was of opinion that the costs are in the discretion of the Court; but if liberty is given to issue the writ, without any order as to costs, the successful party is entitled to them.

22. BLEW V. STEINAN. 11 Exchequer, 441.

Practice—Debt above £20 reduced below £20 by Payment after Action—Judgment—Execution—Ca. sa. for the whole Amount—Irregularity.

The defendant, being indebted to the plaintiff in a sum above 20*l.*, before judgment paid to the plaintiff a sum sufficient to reduce the debt below 20*l.* The plaintiff having signed judgment, and issued a *ca. sa.* for the whole amount, the Court of Exchequer held that the *ca. sa.* was not a nullity, but an irregularity, and the rule was discharged, on the plaintiff paying the costs.

23. BARKER V. THE MIDLAND RAILWAY COMPANY.
18 Com. B. 46.

Railway Company—Right of, to exclude Vehicles from their Station-yard.

This was an action by the plaintiff, an omnibus proprietor, who carried passengers and their luggage for hire to and from a railway-station of the defendants, for a refusal by the defendants' servants to allow him to drive his vehicle into the station-yard. There were demurrers and cross-demurrers raised by the pleadings, and the Court decided in favour of the defendants, on the ground that no duty was shown on the defendants' part to permit the plaintiff to come upon their land.

24. CLOSMADREUC V. CARRELL. 18 Com. B. 36.

Stamp—What sufficient Evidence to raise a Presumption that an Instrument not produced was duly stamped, so as to let in Secondary Evidence of its Contents.

This was an action on a charter-party. The charter-party being unstamped, was within the fourteen days allowed by the 5 & 6 Vict. c. 79, s. 21, for stamping such instruments without payment of a penalty, delivered at the office of the sub-distributor of stamps at Cardiff, for the purpose of its being transmitted to

London to be stamped, the proper amount of stamp-duty and postage being left with it. The clerk in that office, to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands; but they said that if it did, it would in the usual course be returned to the district office in the country. The clerk at Cardiff could not say whether the document was returned to him or not; but he stated, that on search being made for it, no trace of it could be discovered. The Court of Common Pleas held that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents.

25. **KENNET AND AVON NAVIGATION COMPANY V. WITHERINGTON.**
18 Q. B. 533.

Statutory Privilege to interfere with Property, first making Satisfaction—Continuance of Privilege after Expiration of the Power, as limited by Statute, to make the Satisfaction.

By the Kennet Navigation Act, the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose, and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners, as commissioners under the Act should direct. By a subsequent clause, any persons injured by the works were to receive compensation, to be assessed by the commissioners. The commissioners were named in the Act, and power given them to appoint successors from time to time. The navigation was made, and, as part of it, a dam across a river was enlarged. Subsequently all the commissioners died, without having appointed successors. The company afterwards raised the dam, to the injury of a mill-owner below. In an action of trespass in the Queen's Bench, where the right so to enlarge the dam came in question, it was held by Wightman, Erle, and Crompton, JJ., on the authority of *Lister v. Cobley* (7 Ad. & E. 124), that the power to alter the dam still existed, even though the mill-owner should no longer have any means of obtaining compensation, as to which they gave no opinion. Lord Campbell, C.J., however, dissented; holding that, the compensation clause having become incapable of execution by extinction of the commissioners, the powers which the Act had conferred upon the company to cause injury to other persons could no longer be exercised.

26. POUNSETT v. FULLER. 17 Com. B. 660.

Vendor and Purchaser—Measure of Damages where the Vendor fails (without fraud) to make a good Title.

This was an action to recover damages for the non-performance of a contract by the defendant to sell to the plaintiff the right of shooting over a manor, the defendant having failed to make a good title, pursuant to his contract of sale. There was no imputation of fraud or misrepresentation on the part of the vendor, and the Court of Common Pleas held that the plaintiff was not entitled to damages for the loss of his bargain, but only nominal damages, and the expenses incurred in the investigation of the defendant's title; no damages being recoverable for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavours to substitute a new contract, on the failure of the original bargain.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the *LAW MAGAZINE AND LAW REVIEW*, will henceforth be noticed—either shortly, or at length—in its pages.]

A Compendium of the Law and Practice of Vendors and Purchasers of Real Estate. By J. Henry Dart, of Exeter College, Oxford, M.A., and of Lincoln's-Inn, Esq., Barrister-at-Law. Third Edition. London: Stevens and Norton. 1856.

MR. DART's Compendium of the Law of Vendors and Purchasers of Real Estate having taken its place amongst the standard works which a lawyer admits, without special reference or inquiry concerning their merits, into his library, we might well satisfy ourselves with barely notifying the fact of its reappearance in a revised and perfected shape to the Profession. We have pleasure, however, in stating our belief that this new edition has been very well executed, and carefully prepared; and whilst we fully agree with the author in estimating the labour and difficulty of the task which he has, by the success of his former efforts, been induced to undertake, we think that he need not be over-anxious or over-diffident as to the result. So far as we have examined the volume, the new cases seem to have been assiduously noted up, and the enactments subsequently to the year 1852 well digested and explained.

A Book of Costs in the Courts of Queen's Bench, Common Pleas, and Exchequer, the Crown and Queen's Remembrancer's Offices, in Bankruptcy, and the Court for Relief of Insolvent Debtors, Conveyancing, and Miscellaneous Matters, in conformity with the general scale of charges allowed on Taxation, and with the Common Law Procedure Acts, 1852 and 1854, and Bills of Exchange Act, 1855. By Richard G. Dax, Esq., of the Middle Temple, Barrister-at-Law. London: Maxwell. 1856.

MR. DAX, who for many years was Senior Master of the Court of Exchequer, and was recognized as an authority in all matters relating to taxation of costs—to whose courtesy and ability we can moreover of our own knowledge bear testimony—had, it appears from the Preface to the work of which the title is above set out, the intention, frustrated by death, of publishing the results of his great experience for the benefit of the Profession, in a volume upon Costs. This intention, towards the accomplishment whereof some progress had been made during Mr. Dax's lifetime, has been worthily carried out by his son; and the result has been a "Book of Costs," not over bulky, and admirably

got up, which, unless we greatly err, will be in daily use and highly prized, not only by Solicitors, but by the Bar. It seems to us to contain all the information which can reasonably be looked for in such a work.

Note.—The concluding portion of the Review of Mr. Dickson's Treatise on Evidence (commenced in our last No.) is unavoidably postponed until November.

Events of the Quarter.

MISCELLANEOUS.

We rejoice to see that Lord Wensleydale has at length taken his seat in the Upper House as an hereditary peer. Whatever difference of opinion may exist in regard to the power of the Crown to confer life peerages, with a right to sit and vote, all must agree—the public and the Profession alike—that the eminent lawyer who has just been raised to the dignity of a baron of the realm has, by a useful and most honourable career, well merited his advancement.

Note on the Criminal Law Consolidation Bills laid on the table of the House of Lords by the Lord Chancellor.

Parliament has been prorogued while we are going to press, and we are unable to do more than make a few observations on the Bills which the Lord Chancellor, just at the close of the session, laid on the table of the House of Lords.

It is said that the Government plumes itself upon the presentation of these eight Bills for consolidating the Criminal Statute Law, as a set-off to the loss of so many important measures, chiefly through want of a little exertion in carrying them. There can be no doubt that these eight Bills are of great importance, and we trust that they will be pressed forward next year, having only been introduced the last week but one of this session. We must also observe that the labours of Sir F. Kelly are exceedingly to be commended in respect of these Bills; but while we thus state our hopes of a good result at length attending the labours of the Statute Law Commission, we must express the melancholy feelings which arise on a retrospect of what had before been done, and how long a time has been spent in doing nothing to carry forward a work so many years ago commenced. Our readers, and especially those belonging to the Law Amendment Society, know that it is now above fifteen years

since the Commission, issued by its president when Chancellor, made its invaluable reports, and twelve years since the Criminal Law Digest, embodied by him in a Bill, was actually read a second time in the Lords. After some discussion, at the suggestion of Lord Lyndhurst, when Chancellor, it was referred back to the Commission, to which additional members were added, to examine its details. In 1848, Lord Brougham again brought it forward greatly improved by the suggestions of these Commissioners, and of the Profession. In 1850, he a third time presented it, and it was referred to a Committee, who circulated copies of it among the judges of the three kingdoms. From those of Ireland and Scotland, suggestions were received by the Committee; from those of England, none. But Lord Campbell stated, on one occasion, that those learned persons carried the Digest with them, and privately used it, although it could not be cited, as it had not passed into a law. A Digest of Criminal Procedure had in like manner been carefully prepared by the Commissioners; but it never was reduced into the shape of a Bill, and unfortunately the Commission was allowed to expire. When, in 1852, a change of ministry took place, the suggestion, which was favourably received by all who marked the slow progress of the important measure, was acted upon by the Conservative Government, and Lord St. Leonards as Chancellor, though averse to codification, most candidly and diligently superintended the division of the Digest into heads, and different Bills were prepared, one comprising offences against the person being ready when the Government was again changed. His successor, Lord Cranworth, took charge of it, and a Select Committee, with the able assistance of Messrs. Greaves and Lonsdale, the draftsmen of this as well as of the former Digest, examined the whole provisions minutely, and reported it; but too late to pass that session (1858). Next year it was, by an unhappy mistake of Lord Cranworth, submitted to the judges, who consulted not only upon its details, but on the general question of codification (in favour of which the House of Lords had at least three several times decided), and gave those celebrated opinions, which, all readers of both the Bill and their answers, and also all readers of our pages, and of the *Edinburgh* and *Quarterly Reviews*, know full well, proved that the learned judges had given their decisions without taking the ordinary precaution of carefully reading the Bill submitted to them. The grossest blunders were committed by them, and it is hard to say that any persons in a high station ever covered themselves with less honour than these eminent individuals did,—partly from the short time taken to give their opinions, and partly from their strong prejudices against codification. Whoever reads the *Quarterly Review* (vol. xciv. p. 461, *et seq.*), and the *Edinburgh Review* (vol. xcix. p. 581, *et seq.*), will at once perceive how much less than the truth is our statement.

But the fact unhappily remains that it is now twelve years since a Digest of the Criminal Law, not only Statute, but unwritten, was read a second time in the House of Lords; that all the legal authorities in that House approved of its provisions; that it might either

have been passed entire, and followed by a Digest of the Law of Procedure, or divided into parts, and those parts passed successively ; and that now, after all this time has elapsed, we are thankful to have only a chance of carrying a Digest of the Statute portion of it, leaving the Common or unwritten Law untouched.

Surely this melancholy fact speaks trumpet-tongued in support of Mr. Napier's motion for a responsible Minister or department of Justice. He has on more than one occasion ably defined the object of his proposal, and has now announced his determination to renew it at the very beginning of the next session. All friends to the improvement of the law must heartily wish him success.

APPOINTMENTS, &c.

The Queen has been pleased to appoint the Right Hon. M. T. Baines to be the Fourth Charity Commissioner for England and Wales, in place of the Right Hon. Lord John Russell, resigned.

COUNTY COURT JUDGES.—Charles Saunders, Esq., Recorder of Plymouth and Devonport, has been appointed Judge of the Somersetshire County Court (Circuit No. 57), in the room of Graham Willmore, Esq., Q.C., deceased, and John Worledge, Esq., of the Norfolk Circuit, has been appointed to the Judgeship of that district, rendered vacant by the death of Mr. Eagle.

Thomas Smith Badger, Esq., has been appointed by the Benchers of the Hon. Society of Gray's Inn Reader in Real Property, &c., in the place of R. B. Walpole, Esq., who recently resigned that office.

Thomas Chisholm Anstey, Esq., her Majesty's Attorney-General for Hong-Kong, has been appointed a Member of the Legislative Council of that colony.

C. Temple, Esq., has been appointed a puisne Judge of the Supreme Court of Ceylon ; John T. Gilbert, Esq., to be Solicitor-General for the colony of British Guiana ; Henry Tudor Davies, Esq., to be Chief Magistrate for Hong-Kong ; and William Gillespie Dickson, Esq., of the Scotch Bar, and author of "A Treatise on the Law of Evidence in Scotland," has been appointed Attorney-General for the Mauritius.

Alan Ker, Esq., lately Chief Justice of the island of Nevis, has been appointed Chief Justice of the island of Dominica ; and David Cameron, Esq., to be Chief Justice of Vancouver's Island.

CALLS TO THE BAR.*April 30.*

LINCOLN'S INN.—Thomas Key, Frederick Thomas Curtis, Joseph William Chitty, John George Smith, Christopher Cheevers M'Donnell, Cholmeley Austen Leigh, John William Church, Reginald John Cust, Bruce Lockhart Burnside, William Edward Baker, John Gwyn Jeffreys, and Samuel Elgar Sloper, Esqrs.

MIDDLE TEMPLE.—James Prendergast, William Frederick Ward, Samuel M'Culloch, George Greenway Little, and George Collier, Esqrs.

INNER TEMPLE.—William Emerson Laslett, Edward Headlam, M.A., Robert Harcourt Chambers, B.A., Henry Smith, George John Shaw Lefevre, B.A., John Walker, B.A., James Edwin Cole, Ford North, B.A., George Wells, B.A., Henry Casson, B.A., and Robert Baron Templer, B.A., Esqrs.

June 6.

LINCOLN'S INN.—Wells Butler, Edward Poste, Francis Henry Bacon, Athelstane Wilcock, Edward Pardoe, Cotton Hanson, Henry Walthall Walthall, Robert Stuart, Spencer Perceval Butler, Russell Duckworth, and Benjamin Bickley Rogers, Esqrs.

INNER TEMPLE.—John Wood, B.A., Charles Ashbrook Wright Crump, B.A., William Stevenson Owen, Herbert Crompton Herries, M.A., William Markby, B.A., and Richard Hoper, Esqrs.

MIDDLE TEMPLE.—Wm. Lambert Dobson (certificate of honour, first class), Henry Bull Templer Strangways, Edward Yardley, John Haddy, Edmund James, B.A., London University, John Metcalfe, and Leonidas Gautier, Esqrs.

GRAY'S INN.—Adolphus John D'Allain, Henry Nicol, and Clement Dale, Esqrs.

EXAMINATION OF STUDENTS OF THE INNS OF COURT.

Trinity Term, 1856. Public Examination of the Students of the Inns of Court, held at Lincoln's-Inn Hall, on the 19th, 20th, and 21st days of May, 1856.

The COUNCIL OF LEGAL EDUCATION have awarded to—

William Lambert Dobson, Student of the Middle Temple, and Wells Butler, Student of Lincoln's Inn, Esqrs., Certificates of Honour of the first class.

Edward Bullock, Inner Temple, Charles A. W. Crump, Inner Temple, Charles Beard Izard, Lincoln's Inn, William Markby, Inner Temple, Frederick Seeborn, Middle Temple, and Athelstane Wilcock, Lincoln's Inn, Esqrs., Certificates that they have satisfactorily passed a Public Examination.

NECROLOGY.

May.

- 3rd. WALKER, James, Esq., one of the Principal Clerks of Session, Edinburgh.
4th. O'ENS, John, Esq., solicitor, London, aged 44.
6th. MAYNARD, Jonas Alleyne, barrister-at-law, aged 52.
6th. LEW, Archibald M'Arthur, Esq., solicitor, London, aged 38.
12th. FELLOWES, John Butler, Esq., solicitor, Bristol, aged 30.
12th. WILSON, Alexander, Esq., solicitor, London, aged 70.
14th. BELLAMY, Charles, barrister-at-law, Esq., Fellow of St. John's College, Oxford.
15th. GROVE, Edward E. D., Esq., solicitor, London, aged 42.
23rd. HODGKINSON, George, Esq., solicitor, Newark, aged 69.

June.

- 4th. HOLLOWAY, Benjamin, Esq., solicitor, Woodstock, aged 52.
5th. THURSTANS, — Esq., solicitor, Newport, Salop, aged 66.
8th. MEAD, J. C. S., Esq., of Bedford-row, aged 36.
10th. JONES, Alfred Alexander, Esq., solicitor, London, aged 30.
13th. BARRON, Arthur, Esq., barrister-at-law, aged 55.
18th. CHOPPIN, Charles, Esq., solicitor, London.
19th. At Neuilly, near Paris, Graham WILLMOBS, Esq., Q.C., Judge of the County Court of Somersetshire, and Recorder of Wells.
25th. WILSON, John, Esq., barrister-at-law, aged 65.
30th. M'DONALD, Thomas, Esq., Writer and Procurator Fiscal, Fort William, Inverness-shire.

July.

- 11th. BRYAN, George Bryan, Esq., barrister-at-law, London, aged 27.
15th. HOLME, Bryan, Esq., solicitor, London.
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List of New Publications.

Bainbridge—The Law of Mines and Minerals. By W. Bainbridge, Esq., Barrister. Second Edition, carefully revised, and much enlarged by additional matter relating to Manorial Rights; Rights of Way and Water, and Mining Easements; the Sale of Mines and Shares; the Construction of Leases; Cost-book and General Partnerships; Injuries from Undermining and Inundations; Barriers and Working out of Bounds; with an Appendix of Forms and Customs, and a Glossary of English Mining Terms. 8vo. 24s. cloth.

Chitty—The Commercial and General Lawyer; being a plain Exposition of the Law of England in all its departments, and especially of those branches relating to Commerce, Trade, and Manufactures. By E. Chitty, Esq., Barrister. The Eleventh Edition, by T. G. Western, Esq., Barrister. 8vo. 24s. cloth.

Cooke—The Acts for Facilitating the Inclosure of Commons in England and Wales, with a Treatise on the Laws of Rights of Commons, in reference to these Acts, and on the Jurisdiction of the Inclosure Commissioners, in Exchanges and Partition, &c. &c., with Forms as settled by the Commissioners. By G. W. Cooke, Esq., Barrister. Third Edition. 12mo. 15s. boards.

Cushing—The Law and Practice of Legislative Assemblies in the United States of America. By L. Cushing. Royal 8vo. 25s. cloth.

Dart—A Compendium of the Law of Vendors and Purchasers of Real Estate. By J. H. Dart, Esq., Barrister. The Third Edition. 8vo. 26s. cloth.

Dax—A Book of Costs in the Courts of Queen's Bench, Common Pleas, and Exchequer; the Crown and Queen's Remembrancers' Offices, in Bankruptcy, and the Court for the Relief of Insolvent Debtors, Conveyancing, Miscellaneous, &c. &c. By R. Dax, Esq., Barrister. Post 8vo. 15s. cloth.

Locke—The Game Laws: comprising the whole of the Laws now in force on the subject, brought down to the present time. By J. Locke, Esq., Barrister. New Edition. 12mo. 8s. cloth.

Macgregor—The Law of Reformatories. By J. Macgregor, M.A., Barrister. 12mo. 5s. boards.

Macgregor—The Language of Specifications of Letters Patent for Inventions. By J. Macgregor, M.A., Barrister. 12mo. 5s. boards.

Mayne—A Treatise on the Law of Damages, comprising their Measure, the mode in which they are Assessed and Reviewed, the Practice of Granting New Trials, and the Law of Set-off, and compensation under the Lands Clauses Act. By J. D. Mayne, Esq., Barrister. 8vo. 16s. cloth.

Pratt—The Law of Contraband of War ; with a Selection of Cases from the Papers of Right Hon. Sir George Lee, LL.D., and an Appendix from Treaties, Miscellaneous Papers, and Forms of Proceeding, with all the Cases to the present time. By J. T. Pratt, D.C.L., Advocate. 8vo. 14s. boards.

Pratt—The Law Relating to Lighting and Watching of Parishes (3 & 4 Wm. 4, cap. 90), with the additional Statutes, Forms, Index, &c. By W. T. Pratt, Esq., Barrister. Third Edition. 12mo. 4s. boards.

Pycroft—*Arena Cornubia* ; or the Claims of the Commissioners of Woods and Forests to the Sea-coast and Banks of Tidal Rivers in Cornwall and Devon, examined and considered. By J. W. Pycroft, Solicitor. 4to. 21s. boards.

Scott—Costs in the Superior Courts of Common Law and in Conveyancing, also in Bankruptcy, Insolvency, Proceedings in the Crown Office, and on the Crown side, on Circuit and at Sessions, &c. By John Scott, Esq., Barrister. 8vo. 16s. cloth.

Smith—A Manual of Equity Jurisprudence (founded upon "Story's Equity Jurisprudence"). By Josiah W. Smith, B.A., Barrister. Fifth Edition. 12mo. 10s. 6d. boards.

Stannaries—Procedure in the Court of the Vice-Warden of the Stannaries, New Orders, Rules, and Forms, with an Introductory Notice on the Jurisdiction of the Court in relation to Mining Companies, and an Appendix of Statutes. 12mo. 9s. cloth.



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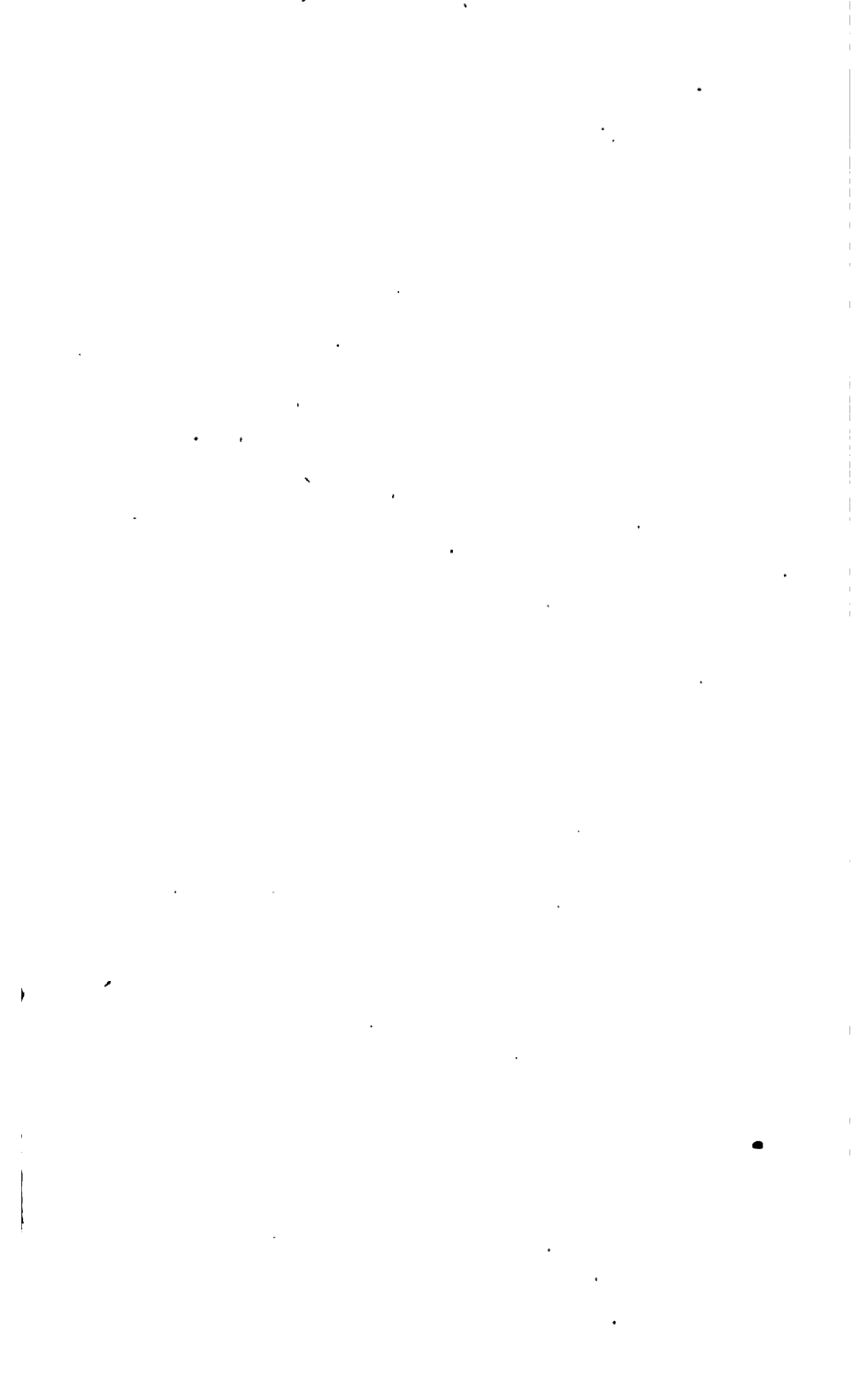
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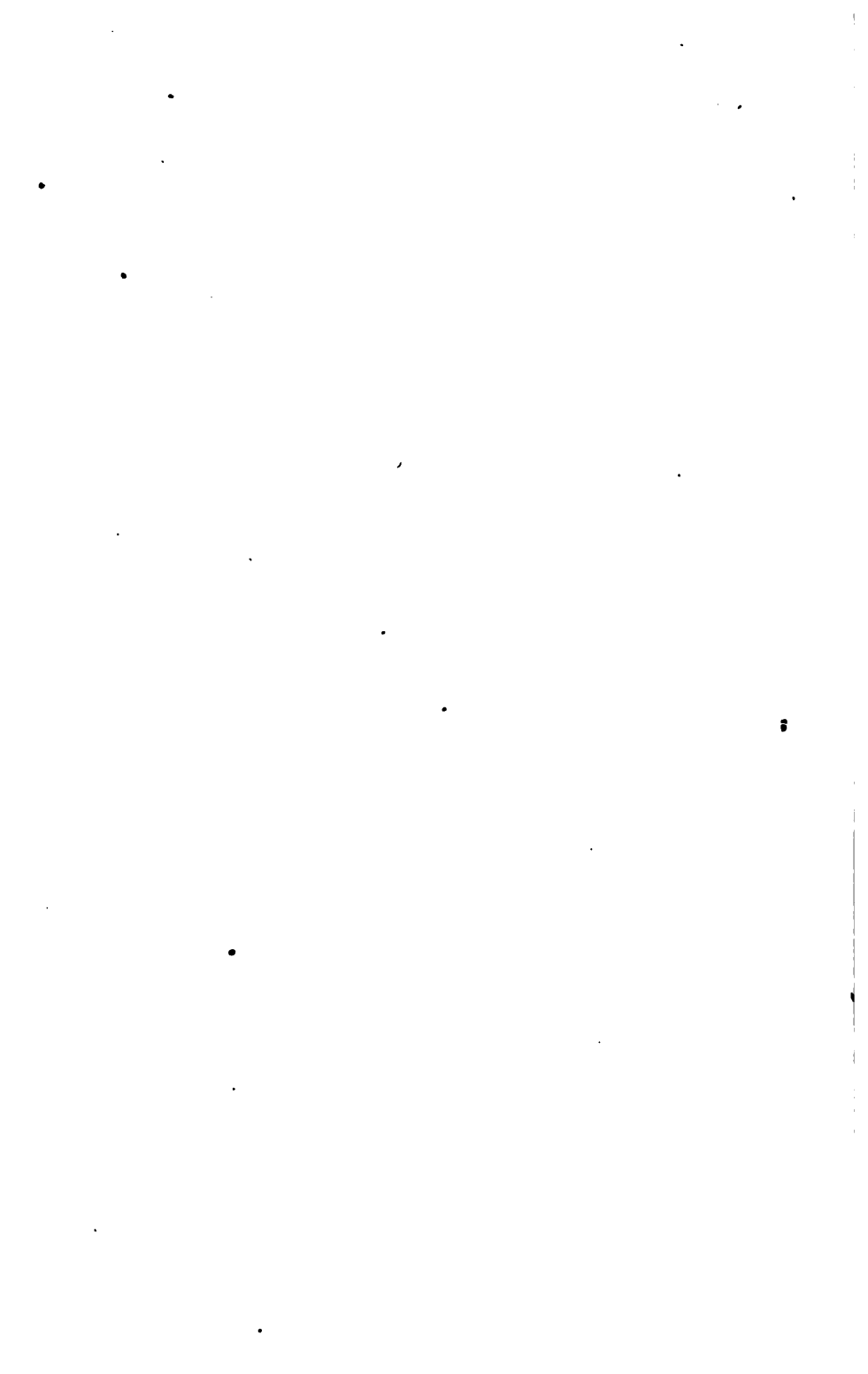
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